Supreme Court, U.S.
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No. 99____

IN THE

Supreme Court of the United States

GEORGIA POWER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, CLC Local No. 84,

Intervenor.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where ERISA and federal common law have affirmed an employer's right to modify or terminate non-vested retiree welfare benefits, may the NLRB use the NLRA to interfere with and void that right?

2. Where this Court and federal common law have determined that an employer is entitled to enforce the contractual right to modify or terminate retiree welfare benefits under ERISA and Section 301 of the LMRA, may the NLRB use Section 8(a)(5) of the NLRA to deny such entitlement?

3. When Congress enacted ERISA to pervasively govern the interpretation of welfare benefit plans, did it intend, as part of ERISA's uniform system of welfare plan administration, that there be a consistent and uniform interpretation of the federal substantive law governing such plans?

4. Whether the NLRB has misinterpreted and misapplied this Court's decision in Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass and extended the Board's substantive jurisdiction in violation of the Court's decision and the intent of Congress?

CORPORATE DISCLOSURE STATEMENT

Georgia Power Company ("Company") states that it is a wholly-owned subsidiary of The Southern Company, which is a publicly-held corporation. The Company has the following affiliates that have issued shares or debt securities to the public:

Alabama Power Company

Georgia Power Company

Gulf Power Company

Mississippi Power Company

Savannah Electric and Power Company

Southern Company Capital Funding, Inc.

Southern Company Capital Trust I

Southern Company Capital Trust II

Southern Company Capital Trust III

Southern Company Capital Trust IV

Southern Company Capital Trust V

Georgia Power Capital, L.P.

Georgia Power Capital Trust I

Georgia Power Capital Trust II

Georgia Power Capital Trust III

Georgia Power Capital Trust IV

Alabama Power Capital Trust I

Alabama Power Capital Trust II

Alabama Power Capital Trust III

Gulf Power Capital Trust I

Gulf Power Capital Trust II

Mississippi Power Capital Trust I

Savannah Electric Capital Trust I

South Western Electricity plc

Southern Investments UK plc

Southern Investments UK Capital Trust I

Birchwood Power Partners, L.P.

Mobile Energy Services Company LLC

Mobile Energy Services Holdings, Inc.

Southern Energy, Inc.

SEI Holdings IX, Inc.

Hidroelectrica Alicura, S.A.

Empressa Electrica del Norte Grande S.A.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Georgia Power Company respectfully petitions for a writ of certiorari to review the affirmation by the United States Court of Appeals for the Eleventh Circuit of a Decision and Order of the National Labor Relations Board.

OPINIONS BELOW

All references to Petitioner's Appendix are cited herein as "PA-A, __" for the Decision and Order of the National Labor Relations Board; "PA-B, __" for the Order of the United States Court of Appeals for the Eleventh Circuit; and "PA-C, __" for the Order Denying Suggestion for Rehearing en banc. The Decision and Order of the National Labor Relations Board is reported at 325

N.L.R.B. No. 59, 157 L.R.R.M. (BNA) 1245 (1998); PA-A, 1(a) - 23(a). The unreported judgment and opinion of the United States Court of Appeals for the Eleventh Circuit is cited as Georgia Power Co. v. NLRB, No. 98-8454 (11th Cir., filed March 8, 1999). The unreported denial of the Suggestion for Rehearing en banc is cited as Georgia Power Co. v. NLRB, No. 98-8454 (11th Cir., filed June 10, 1999).

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit was entered on March 8, 1999. In accordance with Rule 35, Federal Rules of Appellate Procedure, Petitioner also filed a Suggestion for Rehearing en banc before the Eleventh Circuit Court of Appeals, which was denied on June 10, 1999. The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The case involves Sections 3(1), 4(a), 201(1), 402(c), and 402(b)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 et seq; Section 8(a)(5) of the National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. § 158(c)(5); and Section 301 of the Labor Management Relations Act ("LMRA"), as amended, 29 U.S.C. § 185; and which in successive order provide in pertinent part:

29 U.S.C. § 158

(a) Unfair labor practices for an employer

It shall be an unfair labor practice for an employer -

***

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C § 185

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 1002

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1003

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained -

(1) by any employer engaged in commerce or in any industry or activity affecting commerce....

29 U.S.C. § 1051

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than -

(1) an employee welfare benefit plan.

29 U.S.C. § 1102

(b) Requisite features of plan

Every employee benefit plan shall -

***

(3) provide a procedure for amending such plan and for identifying the persons who have authority to amend the plan.

(c) Optional features of plan

Any employee benefit plan may provide -

***

(3) that a person who is named fiduciary with respect to control or management of the assets of the plan may appoint an

investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

STATEMENT OF THE CASE

For over 40 years, Georgia Power Company ("Company") has provided medical and life benefits to all of its retirees, including those who had retired from non-union jobs as well as jobs covered by a collective bargaining agreement ("Agreement") between the Company and Local 84, International Brotherhood of Electrical Workers ("Union"). PA-A, at 2(a)-5(a), 9(a). These retiree medical and life benefits are non-vesting, welfare benefits available only to those individuals who have achieved retiree status from the Company and when, in fact, they do retire from the Company. PA-A, at 2(a)-5(a), 18(a). These retiree welfare benefits have been provided for decades through ERISA-governed benefit plan documents. PA-A, at 2(a)-5(a); Hearing Transcript ("HT") at 175-76.

These retiree welfare benefits were unilaterally instituted and provided to all retirees, and over the years the Company unilaterally and repeatedly modified the level and nature of the benefits, including, among other things, retiree contribution costs. PA-A, at 9(a)-10(a), 14(a). These changes have similarly impacted all retirees, both current and so-called future retirees at the time of the particular change. PA-A, at 10(a). Thus, any employee who subsequently retired would receive the same retiree welfare benefits as current retirees, and would be subject to the same unilateral benefit changes made by the Company prior to his or her retirement. PA-A, at 1(a)-23(a).

The Company made the changes pursuant to language set forth in the various plan documents ("Plan"), which established and provided for the administration of the retiree welfare benefits. The Plan language, known commonly as the reservation of rights provisions, reserved to the Company the unrestricted "right at any time . . . to modify, alter, or amend, in whole or in part, the Plan . . . ." PA-A, at 15(a)-16(a). Indeed, the Plan similarly and expressly reserved the right of the Company "at any time to terminate the Plan." The Plan documents containing the language have been provided to employees, retirees, and the Union leadership for many years as required by ERISA, and in the ordinary course of business. PA-A, at 4(a)-5(a).

During the several decades of instituting, maintaining and modifying retiree welfare benefits, the Company never negotiated over the benefits or the changes with the Union. PA-A, at 2(a),

14(a). The Company consistently informed the Union that the Company maintained complete control over retiree welfare benefits, and, as a result, such benefits were never a subject of negotiation and never addressed in a collective bargaining agreement or a negotiated side agreement. HT at 120-38, 174-78, 180-81, 184, 194-95.

Over the years, the Union never challenged - informally or otherwise - the Company's exercise of unilateral control over the provisions for retiree welfare benefits. The Union had been put on notice of the unilateral control through discussion and correspondence of the parties, and the Plan documents. PA-A, at 4(a)-6(a). The Union had also long been on notice of the reservation of rights language. PA-A, at 4(a)-6(a). In addition, the Union had acknowledged both that it had no agreement with the Company to provide retiree welfare benefits, and that the Company simply chose at its discretion to extend and maintain such benefits for both union and non-union retirees. HT at 25; PA-A, at 3(a)-6(a). Georgia Power Co., 325 N.L.R.B. No. 59 at 4-5, 157 L.R.R.M. (BNA) 1245, at 1246 (1998).

During the course of providing the retiree welfare benefits, the Company had also provided medical and life benefits to both union and non-union employees. The nature, level, provider and cost of such benefits differed - often dramatically - over the years between the non-union and union employees. PA-A, at 14(a). However, the medical and life benefits provided to retirees (regardless of prior union or non-union status) had always been the same as those provided to active non-union employees. PA-A, at 2(a)-9(a). In other words, as affirmed by the Union, the Company always exercised full control and discretion over the non-negotiated welfare benefits provided to non-union employees and all retirees. PA-A, at 2(a)-7(a); HT at 73, 75, 91-92

The institution of Financial Accounting Standard ("FAS") 106 by the Financial Accounting Standards Board necessitated additional changes to the Company's retiree welfare benefits. FAS 106 essentially changed the way in which employers could accrue and account for retiree medical costs in the distant future and therefore resulted in potentially enormous and previously unaccrued retiree medical costs on their respective balance sheets and income statements. Many employers responded to FAS 106 by making a variety of changes, ranging from caps on premiums to termination of certain welfare benefits altogether. On April 21, 1995, the Company announced a series of changes to retiree

medical and life benefits, including the institution of a cap on the Company contribution to medical premiums, tied to years of Company service. PA-A, at 2(a), 7(a)-8(a). The cap will not take effect until, at the earliest, January 1, 2002. In addition, the Company excluded existing retirees and current long term employees from the cap. PA-A, at 2(a), 7(a)-8(a).

The Union on May 5, 1995, made a demand to negotiate over the announced changes, and filed an unfair labor practice charge with the National Labor Relations Board ("Board" or "NLRB"), claiming a failure of the duty to bargain under Section 8(a)(5) of the National Labor Relations Act ("NLRA"). The Company agreed to negotiate with the Union over whether to cede control in the future over retiree welfare benefits, but informed the Union that the Company had the current right to modify the Plan pursuant to the reservation of rights language. The Union refused to negotiate on that basis. HT at 64.

Region 10 of the NLRB issued a complaint against the Company on August 10, 1995. A hearing before Administrative Law Judge William N. Cates (the "ALJ") occurred on November 18, 1996. On February 14, 1997, the ALJ issued a decision which held that the Company's unilateral, prospectively effective changes to retiree welfare plan benefits violated Sections 8(a)(1) and (5) of the NLRA. PA-A, at 6(a)-23(a).

Although no retiree welfare benefits had or have been changed, and would not be changed until January 1, 2002, the ALJ ordered the retiree welfare benefits to be reinstated, and ordered the Company to negotiate over retiree welfare benefits. PA-A, at 21(a)-23(a). The ALJ issued the order despite the fact that the retiree welfare benefits were not vested, and that the Agreement between the parties would expire prior to the announced change taking effect. PA-A, at 6(a)-23(a).

Thereafter, the Company appealed the ALJ's decision to the Board. A three-member panel of the Board considered the case, and a majority of the Board adopted the ALJ's recommended Order, as modified. PA-A, at 1(a)-5(a); Georgia Power Co., 325 N.L.R.B. No. 59, 157 L.R.R.M. (BNA) 1245. However, a minority of the Board's panel dissented, finding that the Union "clearly waived" its right to bargain over the Company's announced modification to retiree welfare benefits pursuant to the plan's reservation of rights clause. PA-A, at 5(a)-6(a).

In "reinstating the benefits," the ALJ and Board majority relied exclusively on the theory that such benefits were a mandatory

subject of bargaining under the NLRA, and that absent the Union's express and explicit waiver of the right to bargain, the Company could not change the benefits. Notwithstanding the holding, the ALJ and Board majority findings of fact and law confirmed that (1) the Union and Company had never negotiated over retiree welfare benefits, (2) the Union had never secured access to retiree welfare benefits through any type of labor agreement, (3) the Union had long been or should have been aware of both the Company's unilateral control over retiree welfare benefits and the reservation of rights language, (4) the provision of retiree welfare benefits was solely a function of the Plan documents, and (5) the retiree welfare benefits were, unlike pension benefits, non-vested benefits to which the employees would not be entitled until after retirement, or at most, not beyond the expiration of the Agreement. PA-A, at 1(a)-23(a).

The jurisdiction of the Eleventh Circuit Court of Appeals for appeal of the Board's Decision and Order was invoked under 28 U.S.C. § 2342 and 49 U.S.C. § 20114(c).

REASONS FOR GRANTING THE WRIT

1. ERISA is a comprehensive statutory scheme which pervasively regulates the field of employee benefits plans, including retiree welfare benefits. See Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). As part of this closely integrated regulatory system, Congress included a series of express requirements and rights of employers to ensure the application of a uniform body of employee benefit laws. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987).

Congress took particular pain to distinguish between pension benefits, which are subject to statutory vesting, and welfare benefits, which are non-vesting absent a specific contractual provision to the contrary. See Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co., 520 U.S. 510, 513-17 (1997). As a result, absent a specific contractual limitation, an employer has complete freedom to modify or terminate welfare plans. See Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995). Moreover, because Congress enacted ERISA with the full awareness of the NLRA, ERISA and the NLRA must be read and applied in concert when the administration of welfare benefits in union settings is at issue. See Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990); United Auto Workers v. Auto Glass Employee

Fed. Credit Union, 858 F. Supp. 711 (M.D. Tenn. 1996), aff'd, 72 F.3d 1243, 1248 (6th Cir. 1996).

The NLRB has openly and repeatedly ignored ERISA's statutory provisions and defied the well-defined body of federal common law on welfare benefits which has evolved, by ignoring reservation of rights language in retiree welfare benefit plans and by treating active employees' future welfare benefits, in all instances, as vested rights. The NLRB's actions will continue to subject employers to precisely the type of disruption, uncertainty, lack of uniformity, and forum shopping Congress sought to foreclose through ERISA's pervasive regulatory scheme. Ingersoll-Rand, 498 U.S. at 140.

2. In non-union settings, the Court and the nine federal courts of appeals which have addressed the effect of reservation of rights language in retiree welfare benefit plans, have all held that, absent extrinsic evidence to the contrary, such language provides the employer an unfettered right to modify, amend or terminate such benefits in accordance with the plan documents. Three of the same Circuits, and one other, have extended the same effect of reservation of rights language to the union setting. Four other federal courts of appeals have held, in union settings, that retiree welfare benefits are presumed to survive the expiration of labor agreements, but that such an inference may be rebutted by reservation of rights language or other extrinsic evidence. In other words, these four Circuit courts have presumed retiree welfare benefits to be vested, absent plan language to the contrary.

Thus, the majority view, represented by this Court and the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits, is that in a non-union setting, absent restrictive contractual language to the contrary, retiree welfare benefits do not vest, and in accordance with reservation of rights language, may be unilaterally changed by the employer. The Third, Fifth, Seventh and Eighth Circuits have clearly extended this view to the union setting. Four Circuits (the First, Fourth, Sixth and Eleventh), however, have employed a rebuttable presumption that in a union setting, welfare benefits are vested rights. All of these Circuits, however, have resolved the status of welfare benefits by applying the accepted contract analysis under federal common labor law - reconciling ERISA, NLRA and Section 301 of the LMRA - in order to reach their holdings.

The NLRB, however, which has become another forum for claims challenging unilaterally changed retiree welfare benefits,

has wholly rejected this body of law and held null and void reservation of rights clauses. At the same time, the NLRB has used the statutory "duty to bargain" waiver analysis to absolutely prohibit unilateral employer changes to retiree welfare benefits. The result of this clear conflict is most evident in the current case law, where cases of indistinguishable facts have resulted in the application of dramatically different analyses, and diametrically opposed results, depending on whether the case was brought in federal court or before the NLRB.

3. The Chairman of the NLRB and the long-time head of the NLRB's Advice Division have both admitted and lamented that the NLRB's unrestrained use of the waiver doctrine to thwart employers' inherent management and contractual rights is in direct conflict with the prevailing contract analysis used by the federal courts to resolve breach of labor contract disputes. See CBS Corp., 326 N.L.R.B. No. 73, at 4-12, 160 L.R.R.M. (BNA) 1021 (1998); Harold J. Datz, Unilateral Changes Under Section 8(a)(5) v. Breaches of Contract Under Section 301: An Attempt at Harmony (1998) (unpublished paper presented at ABA Conference, Oahu, HI) (on file with counsel for Petitioner). The waiver doctrine also fundamentally shifts the allocation and burden of proof to the employer in enforcing labor contract rights, in conflict with the view of the Court and the Circuits. See United Steel Workers of Am. v. Warrior & Gulf Co., 363 U.S. 574, 583 (1960); Chicago Tribune Co. v. NLRB, 974 F.2d 933, 937 (7th Cir. 1992).

The NLRB has heightened the conflict first, by selectively using a contract analysis in Section 8(a)(5) cases when it supports the General Counsel's case, such as in the Board's primary precedent below, Titmus Optical, 205 N.L.R.B. 974 (1973). In addition, the NLRB's own Regions have differed on the interplay between reservation of rights provisions and the waiver doctrine in retiree welfare benefit cases. Second, the NLRB has - even here - expressly stated that its decisions are not constrained by, and need not acknowledge, the federal courts' body of labor contract law developed under ERISA and Section 301. This Court, however, has made it clear that in addressing the NLRB's resolution of the duty to bargain and the contractual rights of employers, it is the federal courts which decide the controlling legal standard. See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157, 182 (1971). At this point, absent the intervention of this Court, the conflict is irreconcilable.

4. Significantly, the NLRB's decision, affirmed without opinion by the Eleventh Circuit, is based on an unwarranted and illogical reading of this Court's holding in a pre-ERISA decision, Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157 (1971). This pre-ERISA decision holds that employers have no duty to bargain under Section 8(a)(5) of the NLRA over retiree welfare benefits for existing retirees. Although the Court's holding in Pittsburgh Plate was limited to existing retirees, the NLRB has taken the illogical leap that it necessarily means that the non-vested future welfare benefits of active employees must also be a mandatory subject of bargaining, and must therefore be vested. The NLRB's unbridled use of Pittsburgh Plate is revealed in the Third Circuit's recent decision, UAW v. Skinner Engine Co., No. 98-3461, 1999 U.S. App. LEXIS 18488, at *1 (3d Cir. Aug. 10, 1999). The Skinner court aligned itself with the Fifth, Seventh, and Eighth Circuits, in opposition to the First, Fourth, Sixth, and Eleventh Circuits, to reject the "Yard-Man inference" and hold that absent a clear contractual ceding by an employer, retiree welfare benefits are non-vested and subject to unilateral change in a union setting. On one level there is a set division among the Circuits concerning the validity of the Yard-Man presumption, while simultaneously the NLRB's strained use of Pittsburgh Plate is contrary to all of the holdings in the Circuits and creates a conflict at every level.

I. THE NLRB'S DECISION IS FUNDAMENTALLY AT ODDS WITH THE CONGRESSIONAL INTENT UNDERLYING ERISA AND WITH EVERY APPLICABLE DECISION OF THIS COURT AND THE FEDERAL COURTS OF APPEALS.

This Court has taken note that in Congress' enactment of ERISA, the reservation to the federal government and courts of the "sole power to regulate the field of employee benefit plans" was ERISA's "crowning achievement." Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98-100 (1983). In imposing this pervasive regulation of employee benefits, Congress set forth numerous specific and detailed statutory provisions to ensure uniformity of interpretation. See ERISA, 29 U.S.C. § 1001 et seq. Among those specific directives were (1) the requirement that employee benefits be provided through written plans, (2) that pension benefits be statutorily vested, and (3) that welfare benefits not be vested. 29 U.S.C. § 1102(a), ERISA § 402(a). The writing requirement, intended to foster understanding and predictability with respect to benefits

administration, was a direct outgrowth of requirements under federal labor contract law, such as the LMRA. See Sprague v. Gen. Motors Corp., 133 F.3d 388, 402 (6th Cir. 1998) (en banc), cert. denied, 118 S.Ct. 2312 (1998); Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986).

In determining that vesting would not apply to welfare benefit plans, Congress intended to afford employers (including union employers) the right to modify medical benefits, in recognition of an employer's need for flexibility to address fluctuating and unpredictable costs and economic variables. See UPIU v. Jefferson Smurfit, 961 F.2d 1384, 1385-86 (8th Cir. 1992); Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988).

This Court first recognized this Congressional intent in Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995), holding "[e]mployers are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." Subsequently, the Court reaffirmed this principle and noted at length that:

> [t]he flexibility an employer enjoys to amend or eliminate its welfare plan is not an accident: Congress recognized that "requiring the vesting of this ancillary benefit would seriously complicate the administration and increase cost of plans . . . [g]iving employers this flexibility also encourages them to offer more generous benefits at the outset since they are free to reduce benefits should economic conditions sour. If employers were locked into the plans they initially offered, they would err on the side of omission."

Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co., 520 U.S. 510, 515 (1997) (quoting Heath v. Varity Corp., 71 F.2d 256, 258 (7th Cir. 1995)); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1160 (3d Cir. 1990).

This Congressional intent is particularly poignant and meaningful in the instant case. Georgia Power Company had provided retiree medical benefits for over 40 years virtually cost-free to all retirees. The need to cap the Company's cost contributions was prompted primarily by the institution of Financial Accounting Standard ("FAS") 106, by the Financial Accounting Standards Board, which requires employers to immediately accrue and account for retiree medical costs to be incurred in the distant future. As a result, the Company faced the prospect of enormous and previously unaccrued retiree medical

costs hitting its balance sheet and income statement. In the economic interest of the business, the Company responded to FAS 106 by setting definite maximum dollar limits on employer-paid retiree welfare benefit premiums and by reducing the percentage of premium payments paid by the Company. The Company unilaterally acted within its power pursuant to the reservation of rights clause in making these modifications to retiree welfare benefits, in order to facilitate predictable accounting of liabilities and to preserve the economic and fiscal viability of the Company. This is precisely the type of unforeseen variable Congress envisioned when it expressly reserved to employers the unfettered right to amend welfare benefit plans.[1]

Moreover, in establishing this right to amend or terminate, neither Congress nor the Court has distinguished between retiree welfare benefits in a union versus non-union setting. Indeed, in the Inter-Modal decision, the challenge to the loss of, among other benefits, retiree welfare benefits, was brought by union employees. 520 U.S. at 512.

In stark contrast, the NLRB has held in retiree welfare benefit cases both below and elsewhere, that when it decides that Section 8(a)(5) of the NLRA applies, the NLRB is not required to consider, in any manner, the effect or meaning of either ERISA, this Court's decisions, or the Circuits' decisions on an employer's right to change or terminate retiree welfare benefit plans. See Georgia Power Co., 325 N.L.R.B. No. 59 at 2 n.9, 157 L.R.R.M. (BNA) at 1246.[2] The NLRB has held to this position despite the fact that

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[1] As the Fifth Circuit noted regarding FAS 106,

> The new and much-publicized accounting rule . . . requires employers to adopt accrual accounting to expense accumulated benefits during employees' working careers rather than the past practice of waiting until the benefits are actually paid. While the change does not represent reductions in cash flow, it dramatically erodes estimates of net worth and pre-tax earnings as employers recognize the present value of projected post-retirement benefits. El Paso is not alone in its strong response; FASB 106 has combined with other factors to redden the financial statements of many companies, particularly those providing generous benefits.

Wise v. El Paso Natural Gas Co., 986 F.2d 929, 932 n. 3 (5th Cir. 1993).

[2] Indeed, at the hearing below, the ALJ announced that in considering the ERISA cases cited by the Company, he would not be bound by any federal court of appeals decisions, but only by Board law, despite acknowledging federal court instructions to the contrary. HT at 237. See Kansas City Power & Light Co., 282 N.L.R.B. 1068, 1069 (1987).

Congress enacted ERISA with full knowledge of the NLRA's existence, and that the NLRA is not privileged to operate in a vacuum unaffected by other federal labor statutes. See United Auto Workers v. Auto Glass Employee Fed. Credit Union, 858 F. Supp. 711 (M.D. Tenn. 1996), aff'd, 72 F.3d 1243, 1248 (6th Cir. 1996); Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990).

It is axiomatic that the NLRB must interpret Section 8(a)(5) in conjunction and consistent with the prevailing body of federal common law and statutory labor law, which in the area of benefits is dominated by ERISA. See Carriers Container Council, Inc. v. Mobile Steamship Ass'n, 896 F.2d 1330, 1340 (11th Cir. 1990), am., reh'g en banc denied, 904 F.2d 28 (11th Cir. 1990). The NLRB has an affirmative obligation to make ERISA and the NLRA work together rather than at cross purposes. See Central State Southeast and Southwest Areas Pension Fund v. Gerber Truck Serv., Inc., 870 F.2d 1148, 1154 (7th Cir. 1989) (en banc).[3]

Somewhat ironically, the one decision of the Court which the Board has so heavily relied upon to exercise control over retiree welfare benefits, Pittsburgh Plate Glass, is also the one decision where the Court and the NLRB dealt directly with the need to accommodate and reconcile various federal labor statutes in applying Section 8(a)(5). In that decision, the NLRB argued, and the Court affirmed, the importance of recognizing the respective definitional and enforcement roles of Section 302 and Section 301 of the LMRA in resolving the jurisdictional role of Section 8(a)(5) over the rights of employees claiming entitlement to retiree welfare benefits. See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S 157, 169-70, 178-79, 182 (1971).

It is clear that Congress intended to preserve to the employer the freedom to exercise complete control over the provision and maintenance of retiree welfare benefits. See Lockheed Corp. v. Spink, 571 U.S. 882, 886 (1996). The Court has manifested that intent in the most unvarnished language. More importantly, the

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[3] The Board here has ignored the Court's requirement that traditional rules of contract construction apply when not inconsistent with federal labor law. See Transportation Communication Employees Union v. Union Pac. R.R., 385 U.S. 157, 160-61 (1966). The Board could have given effect to the prevailing contract view on retiree welfare benefits and its view on the duty to bargain, by upholding the Company's right to make the changes, while requiring the Company to bargain over whether to cede that right. UAW v. Skinner Engine Co., No. 98-3461, 1999 U.S. App. LEXIS 18488, at *1 (3d Cir. Aug. 10, 1999).

Court has directly held that in the full exercise of this control, only the employer can affirmatively cede control through a contract. Inter-Modal, 520 U.S. at 515-16; Adcox v. Teledyne, Inc., 21 F.3d 1381, 1389 (6th Cir. 1994), cert. denied, 513 U.S. 871 (1994). The NLRB, however, has used its primary jurisdiction over labor-management relations to create a vested right to future retiree welfare benefits and to impose restrictions on employers' inherent and ERISA-authorized rights of control over such benefit plans. That is clearly not what Congress intended.

II. THERE IS A CLEAR AND DIRECT CONFLICT BETWEEN THE CIRCUITS AND THE NLRB AS TO THE MEANING AND LEGAL EFFECT OF RESERVATION OF RIGHTS PROVISIONS IN RETIREE WELFARE BENEFIT PLANS.

It is the view of the Court and the Circuits addressing this issue that standard reservation of rights provisions, such as those contained in the Company's Plan documents, are fully enforceable under ERISA and in Section 301 breach of contract actions, and permit employers to unilaterally amend or terminate retiree welfare benefit plans.[4] This unanimous view of the effect and meaning of reservation of rights clauses is also firmly supported by several critical and widely adopted ERISA and labor contract principles.

First, the vesting of welfare plan benefits is purely and solely a function of contract, and it is unchallenged that a vested right to certain retiree medical benefits can only be found if established by contract in an ERISA-governed benefit plan document. See Inter-Modal Rail Employees Ass'n v. Atchinson, Topeka and Santa Fe Ry. Co., 520 U.S. 510, 515 (1997); Alday, 906 F.2d at 665. Second, absent an employer making contractual concessions to the contrary, reservation of rights clauses, which give the employer an unfettered right to modify any portion of the plan, including

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[4] See Curtiss-Wright, 514 U.S. at 76; Sprague v. General Motors Corp., 133 F.3d 388, 403-05 (6th Cir. 1998), cert. denied, 118 S.Ct. 2312 (1998); Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492-93 (2d Cir. 1988); Unisys Corp. v. Retiree Med. Benefits ERISA Litig., 58 F.3d 896, 903-05 (3d Cir. 1998); Spacek v. Maritime Ass'n, 134 F.3d 283, 293 (5th Cir. 1998); Chiles v. Ceridian Corp., 95 F.3d 1505, 1512 n.12 (10th Cir. 1996); Gable v. Sweetheart Cup. Co., 35 F.3d 851, 855 (4th Cir. 1994); UPIU v. Jefferson Smurfit Corp., 961 F.2d 1384, 1386 (8th Cir. 1992); Alday v. Container Corp. of Am., 906 F.2d 660, 665-66 (11th Cir. 1990); Ryan v. Chromalloy Am. Corp., 877 F.2d 598, 603-04 (7th Cir. 1989).

welfare benefits, are conclusive and determinative, their effect going beyond even "take it or leave it." Mathews v. Sears Pension Plan, 144 F.3d 461, 465 (7th Cir. 1998). Third, ERISA plan documents must be read, interpreted and enforced in an integrated manner, and reservation of rights provisions must be given the same effect as all other language contained in the plan documents. See Wise v. El Paso Natural Gas Co., 986 F.2d 929, 939 (5th Cir. 1993); Sharron v. Amalgamated Ins. Agency Serv., Inc., 704 F.2d 562, 566-67 (11th Cir. 1983). Fourth, under ERISA, plan documents and summary plan descriptions ("SPDs") are the sole sources of both retiree welfare benefits and the information to retirees regarding such benefits, and Congress intended that both employers and benefit recipients would be bound by the promises and rights in those plan documents. See 29 U.S.C. § 1022 (1999); Joyce v. Curtiss-Wright Corp., 171 F.3d 130, 135-36 (2d Cir. 1999). Indeed, even where welfare benefits are covered in a collective bargaining agreement, they remain governed by ERISA, and the employer's obligations must be determined under ERISA. See Mackillop v. Lowe's Market, 58 F.3d 1441, 1443-45 (9th Cir. 1995).

Here, the NLRB not only ignored the reservation of rights provisions, but also directly rejected the notion that any contractual rights were at issue. The NLRB then allowed the Union to receive the benefit of every promise of the Plan documents, but held that the Union was not subject to the reservation of rights provision. The NLRB reached this holding despite the fact that the Union had been fully informed on the Plan documents, and Union retirees had for decades enjoyed the benefits and been subjected to all the substantive and administrative provisions of the Plan. The position taken by the NLRB here, as affirmed by the Eleventh Circuit, is an absolute rejection of the requirements of ERISA and the view of the Court and all nine Circuits which have addressed the meaning and effect of reservation of rights provisions.

A. The Application Of The Prevailing View To The NLRB's Findings.

One of the more troublesome aspects of the NLRB's decision is the undisputed fact that, had the identical factual findings made by the NLRB in this case been instead subjected to this Court's and the Circuits' contract analysis of ERISA's reservation of rights provisions, the outcome would have been quite different. The prevailing federal court view treats challenges to welfare benefit modifications under reservation of rights language as breach of

contract claims under either ERISA in the non-union setting, or under ERISA and Section 301 in the union setting. See Joyce, 171 F.3d at 135-36. Such treatment is precisely in line with Congressional intent since, in addition to establishing uniformity, ERISA was enacted "to protect contractually defined benefits." Massachusetts Mut. Life Ins. v. Russell, 473 U.S. 134, 149 (1985).

Here, the NLRB and the Union admitted to 40 years of uninterrupted and absolute control by the Company over all aspects of retiree welfare benefits, during which the parties never negotiated over such benefits, the Union was aware the benefits were non-vested and only provided through the Plan documents, and the Union simply left it to the Company to choose - in its discretion - whether and at what level to provide retiree welfare benefits. PA-A, at 1(a)-23(a). In other words, the only source or reference to the retiree welfare benefits was the Plan documents, including the reservation of rights language, and the unchallenged and undisturbed 40 year history of unilateral changes made by the Company.

Under the prevailing view, absent collective bargaining language to the contrary or other extensive evidence establishing a bargaining away of contractual rights, courts agree that ERISA provides a union employer with the "inherent right" to modify or amend its benefits plan. Murphy v. Keystone Steel and Wire Co., 61 F.3d 560, 567-69 (7th Cir. 1995); John Morrell Co. v. UFCW, 37 F.3d 1302, 1304-08 (8th Cir. 1995). Indeed, as the D.C. Circuit noted in Road Sprinkler Fitters Local Union No. 669 v. NLRB, 600 F.2d 918, 921-22 n.7 (D.C. Cir. 1979), if "an examination of the written agreement, negotiating history and past practices demonstrates that employer action is not a breach of contract, it will not likely be a violation of § 8(a)(5) either." Again, these are precisely the present conditions.

Where there is no collective bargaining language regarding welfare benefits, it is particularly clear that ERISA and the language in applicable plan documents govern whether a company may unilaterally amend or terminate its retiree life and medical plans, given the unambiguous and unqualified reservation of right to do so. See EPE, Inc. v. NLRB, 845 F.2d 483, 491 (4th Cir. 1991). In other words, where the plan contains an unambiguous, unqualified reservation of the right to amend or terminate benefits, the employer may freely do so unless specifically limited by the

plan documents. See Deibler v. UFCW Local Union 23, 973 F.2d 206, 210 (3d Cir. 1993) (citation omitted).[5]

The decision and language in UPIU v. Jefferson Smurfit Corp., 961 F.2d 1384 (8th Cir. 1992), clearly demonstrates the application of the prevailing view in the union setting. In Jefferson Smurfit, based on the plan document's reservation of rights language -- language essentially identical to the plan language at issue herein -- the court found no violation of Section 301 of the LMRA where 1) the employer unilaterally terminated retiree health benefits, and 2) the collective bargaining agreement did not address the benefits. In so holding, the Eighth Circuit stated:

> This is not to say that employers and employees cannot collectively bargain for welfare benefits plans, or that they cannot bargain to have welfare benefits vest. The law is settled on this point. However, if they are to be given effect, the fruits of those bargains must be reduced to writing and incorporated in some fashion, into the formal written ERISA plan provided to employees. In this case, there was no reference at all in the plan to the collective bargaining agreement; there was no reference in the written collective bargaining agreement to vested lifetime benefits in the plan or fixed premiums. In short, there is no writing whatsoever of terms contrary to the reservation of rights clause in the plan.

Jefferson Smurfit, 961 F.2d at 1386.

Here, where the reservation of rights language was unambiguous as to the Company's right to amend or terminate the Plan, the collective bargaining agreement was silent on any matter of benefits, and there was no other extrinsic evidence of the Company limiting its rights under the Plan, the prevailing view under ERISA and Section 301 would have affirmed the Company's right to make the changes at issue. See Jefferson Smurfit, 961 F.2d at 1386. Notably, the Eleventh Circuit has acknowledged the prevailing view by proving the exception. In USW v. Connors Steel Corp., 855 F.2d 1499, 1502-05 (11th Cir. 1988), the court held that the reservation of rights language did not allow the employer to

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[5] This principle is simply a function of the fundamental tenet of federal labor law that the collective bargaining relationship is not merely a function of the literal four corners of a traditional labor agreement, but is also controlled by external documents, and past understandings and patterns of conduct. See Ryan v. Chromalloy Am. Corp., 877 F.2d at 601, 603-06 (7th Cir. 1989); Sanderson v. Ford Motor Co., 483 F.2d 102, 112 (5th Cir. 1973).

change retiree welfare benefits when collective bargaining language specifically contradicted the plan document language.

As a result of this conflict between the prevailing view and the NLRB's singular focus in enforcing Section 8(a)(5), an employer who has unilaterally provided retiree welfare benefits pursuant only to an ERISA plan document, will likely successfully defend any challenge to plan changes in federal court, but will be absolutely prohibited from making such changes if challenged before the NLRB.

B. The Split View On The Effect Of A Collective Bargaining Agreement.

The Circuits are essentially split evenly on the effect, if any, a collective bargaining agreement has on both the vesting of future retiree welfare benefits, and the ability of an employer to unilaterally change such benefits. Consistent with the prevailing view on reservation of rights clauses, the Third, Fifth, Seventh and Eighth Circuits have adopted the view that, where the collective bargaining agreement is either silent on the issue or expressly reserves to the employer the right to modify retiree welfare benefits, such benefits are subject to unilateral changes because they (1) do not survive the expiration of the agreement, and (2) do not vest in perpetuity.[6] Under this view, unless the parties have expressly stated a contrary intent in the collective bargaining agreement, retiree welfare benefits do not survive the agreement and are therefore subject to the employer's reservation of rights. Senn, 951 F.2d at 814-16; Murphy, 61 F.3d at 566-67.

A contrary view on the meaning of silence in the collective bargaining agreement on retiree welfare benefits has been voiced by the First, Fourth, Sixth and Eleventh Circuits.[7] This contrary view, as first set out in the Section 301 case of UAW v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), reasons that active employees who agree to a labor contract in which they may forego wages for benefits after retirement likely will do so only with the assurance

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[6] Senn v. United Dominion Indus., 951 F.2d 806, 814-16 (7th Cir. 1992); UPIU v. Champion Int'l Corp., 908 F.2d 1252, 1261 n.12 (5th Cir. 1990); Anderson v. Alpha Portland Indus., 836 F.2d 1512, 1516 (8th Cir. 1988), cert. denied, 489 U.S. 1051 (1989); Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325, 330-31 (3d Cir. 1984).

[7] Stewart v. KHD Deutz Corp., 980 F.2d 698, 702-03 (11th Cir. 1993); Keffer v. H.K. Porter Co., 872 F.2d 1499, 60, 62-64 (4th Cir. 1989); Smith v. ABS Indus., Inc., 890 F.2d 841, 846 (6th Cir. 1989); USW v. Textron, Inc., 836 F.2d 6, 8-9 (1st Cir. 1987).

that they will receive such benefits throughout retirement. Thus, when parties contract for retiree welfare benefits, it is presumed that the benefits were intended to survive contract expiration or continue during retiree status. See Armistead v. Vernitron Corp., 944 F.2d 1287, 1294 (6th Cir. 1991).[8]

In adopting a presumption or inference of "lifetime" benefits, however, the Yard-Man court subjected that presumption to a contract analysis, in order to determine whether it was consistent with the true intent of the parties. Yard-Man, 716 F.2d at 1479. Thus, the Sixth Circuit clearly held that the question of whether the parties intended the retiree welfare benefits to survive the expiration of the labor contract is "not settled by statute, but is a question of contract interpretation." Armistead, 944 F.2d at 1294.

Other courts utilizing a presumption of vesting have similarly applied a contract analysis, looking to the existence of collective bargaining agreement language, plan document language, and other written or verbal commitments or understandings by the parties, to determine if the employer promised to vest the retiree welfare benefits throughout retirement. Armistead, 944 F.2d at 1294-97.[9]

In the present case, the combination of the Agreement's silence as to retiree welfare benefits, the absence of any negotiating history on such benefits, the mutuality of understanding between the Union and Company that retiree welfare benefits existed at the sole discretion of the Company, and the confirmation of this understanding by the Company's decades-long pattern of unilateral

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[8] It is important to note here, that the bargained-for exchange rationale of Yard-Man - reduced wages for vested retiree benefits - does not apply in the present case, where the Union never offered or exchanged any value for retiree welfare benefits. In any event, the Third Circuit most recently labeled the Yard-Man inference "contrary to Congress' intent in choosing specifically not to provide for the vesting of employee welfare benefits." UAW v. Skinner Engine Co., No. 98-3461, 1999 U.S. App. LEXIS 18488, at *1 (3d Cir. Aug. 10, 1999).

[9] In a recent article on the vesting of retiree medical benefits and the impact of the Sixth Circuit's en banc decision in Sprague v. General Motors Corp., a proponent of the "life-time vesting" inference in Yard-Man admitted that there is no analytical distinction between non-union and union retiree benefit cases, and that courts should utilize a contract analysis in either instance. Sacher and Payne, Retiree Health Benefits: Sixth Circuit Deals the Retirees Out, 14 The Labor Lawyer, 498-99 (1999).

modifications, would compel enforcement of the Company's contractual rights under either the prevailing view or the rebuttable presumption approach. Indeed, the Sixth Circuit has recently noted that the terms of a plan document govern the provision of benefits to the extent a provision of a collective bargaining agreement directly conflicts with the terms of the plan. See Bakery and Confectionery Union v. New Bakery Co., 133 F.3d 955, 960 (6th Cir. 1998).

The immediate problem created by the NLRB here is not that it has chosen unwisely between the prevailing view or the rebuttable presumption approach, but that it has instead summarily rejected both approaches in exchange for a rigid statutory doctrine ignoring ERISA and wholly contrary to the controlling body of federal labor law. In so doing, the NLRB has evaded Congressional intent and the holdings of this Court and the Circuits. In the context of federal labor law, the courts rather than "the Board, are the primary source of contract interpretation." NLRB v. United States Postal Serv., 8 F.3d 832, 837 (D.C. Cir. 1993) (citing Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 202 (1991)). The NLRB's blatant usurpation of the federal courts' role in labor contract interpretation is a direct and unapologetic affront to both the Congressional requirements for uniformity and predictability in federal labor law, and the NLRB's obligation to strike a "reasonable balance . . . between competing policies." Visiting Nurses Health Sys. Inc. v. NLRB, 108 F.3d 1358, 1360 (11th Cir. 1997); Leach v. Pan Am. World Airways, 842 F.2d 285, 289-90 n.8 (11th Cir. 1988).

The untenableness of the NLRB's position is exacerbated by its own decisions, and its display of internal inconsistency and conflict. The NLRB in this case relied heavily on the silence of the labor agreement as to retiree welfare benefits to support its rejection of ERISA and the controlling body of federal labor law. Yet, the NLRB has acknowledged that benefit plans, by themselves, are contractually binding between parties. The NLRB has held "[a] health insurance plan is a benefit constituting a term and condition of employment whether established pursuant to a collective-bargaining agreement or not." Shane Felter Indus., 314 N.L.R.B. 339, 346 (1994) (citing Beitler-McKee Optical Co., 287 N.L.R.B. 1311, 1312 (1988)). Similarly, the NLRB has held, "whether or not [a benefit] plan is included in or provided for in the contract is not determinative. The issue is whether or not the plan has been in force for sufficient time to establish it as a term and condition of employment of the employees." McDaniel Ford,

Inc., 322 N.L.R.B. 956, 963 (1997) (citing Arizona Portland Cement Co., 302 N.L.R.B. 36, 44 (1991)). It is painfully obvious that the NLRB has intentionally turned a blind eye to its own legal precedent in an effort to escape the application of a contract analysis which would establish, in no uncertain terms, the Company's right to unilaterally modify these retiree welfare benefits.

III. THE NLRB'S USE OF THE WAIVER ANALYSIS ADDS TO AND UNDERSCORES THE CONFLICT BETWEEN THE NLRB AND THE FEDERAL COURTS AS TO THE MEANING AND EFFECT OF RESERVATION OF RIGHTS LANGUAGE.

As discussed above, in addressing Section 8(a)(5) duty to bargain cases, the NLRB has explicitly rejected the contract analysis approach of the Court and the Circuits. See Resthaven Corp., 322 N.L.R.B. 750, 753-54 (1996). Instead, the NLRB has blindly applied the "clear and unmistakable waiver" analysis, which permits unilateral employer action only where the subject matter at issue has been "fully discussed and consciously explored during negotiations," and the union has explicitly and specifically relinquished a right to bargain. Midwest Power Systems, Inc., 323 N.L.R.B. 404, 406-07 (1997), enf. denied, 159 F.3d 636 (D.C. Cir. 1998). As applied by the NLRB, this waiver analysis is a circular doctrine which "tilts the decision in the union's favor," Chicago Tribune Co. v. NLRB, 974 F.2d 993, 937 (7th Cir. 1992); HHS v. FLRA, 976 F.2d 229, 232 (4th Cir. 1992), and, by necessarily requiring an explicit, "neon-like" agreement, insulates unions from compromises made during negotiations. Carron and Broughton, When Is 'No' Really 'No'? The NLRB's Current Position on Freedom of Contract, Management Rights and Waiver, 13 The Labor Lawyer 299 (1997).

The artificiality of the waiver analysis is evidenced in three ways. First, it clearly violates a central axiom of federal labor law - that the employer retains all rights not otherwise given up to the union through contract, negotiation or past practice. See United Steel Workers of Am. v. Warrior & Gulf Co., 363 U.S. 574, 583 (1960); International Union of Elec., Elec., Salaried, Mach. and Furniture Workers v. Murata Erie N. Am., Inc., 980 F.2d 889 (3d Cir. 1992). Consistent with this tenet, the contract analysis places the burden of proof and persuasion on the union to establish a relinquishing of an employer's unilateral right. The waiver analysis adopted by the NLRB, however, flips the process and

places the burden on the employer to prove it affirmatively acquired the unilateral right.

It is this fundamental distortion of a key principle of federal labor law which lead NLRB Chairman William Gould, a member of the majority in the decision below, to subsequently reconsider (shortly before his resignation) his position on the use of the waiver analysis in 8(a)(5) cases. In a concurring opinion in CBS Corp., 326 N.L.R.B. No. 73, at 2, 160 L.R.R.M. (BNA) 1021 (Aug. 27, 1998), Chairman Gould stated as follows:

> I write separately to express my disagreement with Board precedent which concludes that an employer cannot alter terms and conditions of employment unilaterally without obtaining a clear and unequivocal waiver from the union. More specifically, I find fault with the Board's application of the clear and unmistakable waiver standard in recent years. I am of the view that this line of authority does not promote stability and maturity in relationships between labor and management . . . . Moreover, my view is that the current law of the Board promotes forum shopping because of the fact that dramatically different results will be available from courts and arbitrators as opposed to those which can be obtained before the Board.

Chairman Gould also observed that the federal courts resolve controversies such as the one at hand by assessing the labor agreement, other contractual obligations, bargaining history, and past practices, and then placing the burden of proof on the party seeking to show a contractual violation. See CBS Corp., 326 N.L.R.B. No. 73, at 2-3, 160 L.R.R.M. (BNA) at 1021. He then succinctly noted that "[f]or the Board it is all the other way around." CBS Corp., 326 N.L.R.B. No. 73, at 2, 160 L.R.R.M. (BNA) at 1021. This remarkable admission was foreshadowed in a 1998 speech by Harold Datz, Chief Counsel to Board member Hurtgen (the dissenting member in the decision below) and the long time head of the Board's Division of Advice, wherein Mr. Datz asserted that the NLRB's waiver analysis was in direct conflict with the contract analysis, and that the advantage of the federal court's approach is that it brings Section 8(a)(5) principles into accord with Section 301 cases. Datz, supra at 8.[10]

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[10] Recently, in UAW v. Skinner Engine Co., No. 98-3461, 1999 U.S. App. LEXIS 18488, at *1 (3d Cir. Aug. 10, 1999) (discussed at length below), the Third Circuit, in a mirror image of the Board's approach, directly held that the union or employees had the affirmative duty to prove vesting through "clear and

Second, the inherent disengenousness of the waiver analysis and its creation of a conflict and forum shopping is readily apparent in the existing case law. For example, the Seventh Circuit recently held that an employer in a union setting had, with one month advance notice, the unilateral right to change retiree welfare benefits. See Rosetto v. Pabst Brewing Co., 128 F.3d 538, 540-41 (7th Cir. 1997). The NLRB, however, presented with two weeks advance notice of changes in retiree welfare benefits, found an 8(a)(5) violation. See Union Fork & Hoe Co., 325 N.L.R.B. No. 174, at 4, 158 L.R.R.M. (BNA) 1193, 1194 (June 17, 1998).

The Fourth, Seventh and D.C. Circuits have openly repudiated the NLRB's "clear and unmistakable" waiver standard. The D.C. Circuit has held that the waiver doctrine

> is illogical on two fronts: it first transforms a dispute over contract interpretation into an unfair labor practice case, and then resolves the case without even answering the interpretation question that spawned the dispute in the first place.

IRS v. FLRA, 963 F.2d 429, 439 (D.C. Cir. 1992). The same court went on to say that this "illogical and internally inconsistent [approach] ...[undermines] ... the stability of the ... collective bargaining process." Id. at 440-41; see also HHS v. FLRA, 976 F.2d at 232; Chicago Tribune, 974 F.2d at 937.

This conflict resides not between only the courts and NLRB, but also within the NLRB. In the proceedings below, the Company extensively discussed a federal district court decision in IBEW, Local 455 v. Northeast Utilities, Western Massachusetts Elec. Co., No. 92-30086-F (D. Mass. April 7, 1993), and the corresponding Region One NLRB decision in a related Section 8(a)(5) charge. The facts and considerations of Northeast Utilities are essentially identical to the present matter. In that case, an electric utility unilaterally reduced its proportion of payment to retirees' health care costs from 100% to 50%. The union argued this change violated the retirement plan covered by the collective bargaining agreement, in part because the plan provided that it would "continue in force its present practices with respect to benefits provided...." The union filed an 8(a)(5) unfair labor practice

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express" language. Moreover, the Skinner court placed no requirement on the union employer to expressly reserve the right - either in the CBA or the SPD - to unilaterally change retiree welfare benefits. Id.

charge and also filed a Section 301 action under the LMRA in federal district court.

Both the NLRB and the district court held that in accordance with the language of the retirement plan, which had been negotiated, health benefits were not covered by the retirement plan or the collective bargaining agreement but instead were provided under the relevant Group Insurance plan. The Group Insurance plan, in contrast to the retirement plan, had a reservation of rights clause which explicitly gave the company the discretion to change or end the insurance at any time. As a result, neither the collective bargaining agreement nor the incorporated retirement plan was affected. There was no Section 301 violation because the plan document for retiree benefits, including the Summary Plan Description ("SPD"), reserved to the company the exclusive right to amend the plan, and the NLRB found no duty to bargain over such changes. See Northeast Utilities, Western Massachusetts Elec. Co., Case 1-CA-29317 (June 11, 1992).[11] Adding to this chaos, the NLRB has held that absent an agreement to the contrary, retiree welfare benefits may be terminated without violating Section 8(a)(5). See Brown & Sharpe Mfg. Co., 299 N.L.R.B. 586, 615 (1990).[12]

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[11] The conflict is further evidenced in the NLRB Region 16 case, Amoco Chemical Co., Case 16-CA-16278 (March 13, 1995), when the union and NLRB General Counsel claimed the Company had violated Section 8(a)(5) by unilaterally changing retiree medical benefits. The ALJ found no violation, holding that under the medical plan's reservation of rights provision, the Company had the right to make unilateral changes. Notably, the ALJ found, as in the case here, that the parties never negotiated either the retiree welfare benefits or the reservation of right language. Also, the ALJ found that while the reservation of rights language was unfavorable to the union, the union was on notice of the language, and was free to (but chose not to) negotiate a deletion of the language. This is precisely what occurred in the instant matter.

[12] The vacuous and institutional-driven nature of the NLRB's holding here is revealed first, through its absolute rejection of the contract analysis doctrine. The majority rejected dissenting member Hurtgen's balancing solution, which would preserve the Company's contractual rights to make these specific changes, but would require the parties to negotiate over the Company's future retention of such rights, allowing both Board and federal ERISA law to operate in accordance with the other. Bakery and Confectionery Union v. New Bakery, 133 F.3d 955, 959-61 (6th Cir. 1998). Second, the shallow nature of the NLRB's reasoning and holding is further confirmed by the NLRB's admission that while the NLRA and the reservation of rights language allow the Company to change retiree welfare benefits for retirees, the NLRB has manufactured the notion that those same contractual rights do not permit the Company to announce those same changes in advance for active employees. If the Company can lawfully terminate or change the benefits immediately on any given day, the Court must address the question:

Finally, the NLRB's own confusion and conflict over the use of the waiver analysis is prominently displayed in the instant matter. The ALJ and NLRB below heavily relied on the NLRB's prior holding in Titmus Optical, 205 N.L.R.B. 974 (1973), to find the Company in violation of Section 8(a)(5). However, while the NLRB in this case premised its decision on the waiver doctrine, the Titmus Optical case was decided based on a contract analysis.

In Titmus Optical, the company announced it would discontinue paying group life insurance premiums for retirees; it also changed insurance carriers and eliminated retirees from the group of individuals covered by the life insurance. The NLRB found an 8(a)(5) violation due to past practice and language in the collective bargaining agreement which promised continuation of existing plans and payments for life insurance premiums for eligible retired employees. Id. at 979-80.

Thus, the NLRB based its decision in Titmus on contractual language and past practice relating to a specific contractual clause which, in contrast to the present case, required the company to continue a retiree welfare plan and to pay a certain level of premiums. In Titmus, there was no evidence that plan documents existed which outlined the rights and obligations of the parties, because the collective bargaining agreement contained the relevant (and only) language which clearly required the company to maintain certain benefits.

In other words, while the NLRB applied a traditional contract analysis in Titmus Optical, it refused to do so here, where the Union failed to negotiate language which would have created vesting and post-contract rights in retiree welfare benefits.[13] The

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Why can't the change be announced in advance? See Visiting Nurse Health Sys., Inc. v. NLRB, 108 F.3d 1358, 1460 (11th Cir. 1997); NLRB v. United States Postal Serv., 8 F.3d 832, 837 (D.C. Cir. 1993).

[13] The NLRB is attempting to create a right that the Union was unable, or unwilling, to secure through negotiations - a vesting in retiree welfare benefits beyond contract expiration. However, such action is not only well beyond the NLRB's role or jurisdiction, but also fundamentally disruptive of the labor negotiations process. As the Fifth Circuit noted in NLRB v. E-Systems, Inc., 103 F.3d 435, 442 (5th Cir. 1997), "there must come a time for repose in agreements, including CBA's, when grown-ups are deemed to accept responsibility for their own acts - and omissions - and post hoc second bites at the apple can no longer be taken. In this case, the time is now." Here, the Union had over 40 years to wrest away from the Company the unilateral right to control retiree welfare benefits but never attempted to do so. Indeed, after the announced change, the Union was explicitly offered that opportunity, which it rejected. Neither the NLRB nor the

NLRB obviously eschewed use of the contract analysis for the simple reason that the Union's case clearly could not be sustained under that approach. The NLRB's sham of disclaiming authority to resolve the issue of contractual interpretation is also a direct rebuke of the Court's holdings in 8(a)(5) cases. See NLRB v. C&C Plywood Corp., 385 U.S. 421, 429 (1967); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 279 (1956). This is the essence of doctrinal conflict and forum shopping, and warrants the Court's resolution.[14]

IV. THE NLRB'S UNAUTHORIZED EXTENSION OF THIS COURT'S HOLDING IN PITTSBURGH PLATE GLASS CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE CIRCUITS.

Prior to ERISA's enactment in 1974, this Court held in Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157 (1971), that retirees' benefits are *not* a mandatory subject of bargaining within the meaning of Sections 8(a)(5) and 8(d) of the NLRA, because they cannot be defined as "terms and conditions of employment" for active employees. In that case, this Court discussed and analyzed the very narrow issue of whether mid-term unilateral modifications to benefits available to already-retired employees constitute an unfair labor practice within the meaning of the NLRA. Pittsburgh Plate Glass, 404 U.S. at 159-60. In dicta, however, the Court offered without further clarification, that "the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining." Id. at 180.

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federal courts should give to the Union what the Union has been unable or unwilling to secure through negotiations.

[14] The confusion and conflict between the NLRB's decisions is only exacerbated by Chairman Gould's concurrence in CBS Corp., where he cites the Court's decision in C&C Plywood as approval of the "clear and unmistakable" waiver doctrine. CBS Corp. 326 N.L.R.B. No. 73, at 5, 160 L.R.R.M. (BNA) at 1021. Notably, however, the Court makes absolutely no reference to the waiver doctrine in C&C Plywood. In Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983), the Court did approve the use of the waiver doctrine in § 8(a)(3) cases involving discrimination against union officials. However, in adopting the "clear and unmistakable" approach in protecting union representatives' rights, the Court relied, in part, on the Circuits' unanimous agreement at the time on the use of the waiver doctrine in such circumstances. Id. at 708 n.12. Since that decision, and as noted above, at least three Circuits have rejected the current application of the clear and unmistakable approach in § 8(a)(5) cases. Again, the conflict between the NLRB, the Circuits and this Court as to both the existence and substance of the waiver doctrine is broad and fundamental.

The Board has seized on that dicta, first in Titmus Optical Co., 205 N.L.R.B. 974 (1973) and more recently in Midwest Power Systems, Inc., 323 N.L.R.B. 404 (1997), enf. denied, 159 F.3d 636 (D.C. Cir. 1998), to impose a blanket prohibition on non-negotiated changes in retiree welfare benefits. In so doing, the Board has relied on Pittsburgh Plate Glass to vest otherwise non-vested retiree welfare benefits, without even limiting the vesting to the expiration of the current labor agreement. It is clear that Pittsburgh Plate Glass, decided without the benefit of ERISA, was never intended to categorize retiree welfare benefits as vested, regardless of their status as subjects of bargaining.[15]

While recognition of the speculative nature of non-vested retirement benefits appears to have driven the Court in Pittsburgh Plate Glass to foreshadow the legal distinction between vested versus non-vested rights as codified in ERISA, the Board has blindly continued its affirmative rejection of this distinction. Although Pittsburgh Plate Glass was decided prior to the enactment of ERISA, the Court showed significant respect for the application of contract principles, and the marriage between vested rights and breach of contract claims, which mirrors the post-ERISA distinction between vested and nonvested retiree benefits. If a union wishes to bargain over retiree welfare benefits and create contractually-enforceable vesting rights, then nothing in Pittsburgh Plate Glass prevents any labor organization from striking such a bargain. Jefferson Smurfit, 961 F.2d at 1386. The Board's pervasive rejection of this Court's and the Circuits' rulings on the application of core labor contract principles to retiree welfare benefits matters is inexplicable, except as a matter of institutional hubris.[16]

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[15] Indeed, in reliance on Pittsburgh Plate Glass, the Court should reject the effect of the Board's misapplication of the 1971 decision, based on the extensive discussion and attention that this Court devoted to the speculative nature of non-vested retiree welfare benefits. While the Board's Order here held that the Company's current employees unquestionably have a "direct interest" in their future retirement benefits (specifically, nonvested retiree welfare benefits), this Court previously rejected that same argument in Pittsburgh Plate Glass, 404 U.S. at 176, 178, 181.

[16] Curiously, while the NLRB relied upon contract doctrines found in statutes other than the NLRA in making its case before the Court in Pittsburgh Plate Glass, the current Board has rejected that process, presumably because it undermines the Union's current position. Further, while the Court in Pittsburgh Plate Glass recognized the "undeniable" interest that current employees may have in assuring that negotiated retirement benefits are administered correctly, it also noted that (1) the remedy for breach of that obligation rests in § 301 of the Labor

The Board's unprincipled use of Pittsburgh Plate Glass to evade the vested/non-vested distinction is most emphatically revealed in the Third Circuit's recent decision in UAW v. Skinner Engine Co., No. 98-3461, 1999 U.S. App. LEXIS 18488, at *1 (3d Cir. Aug. 10, 1999). In Skinner, the Company eliminated or reduced retiree medical and life benefits, and made the changes retroactive to cover retirees prior to the most recent labor agreement. The Union and retirees filed Section 301 breach of contract and ERISA actions, claiming language in the collective bargaining agreement ("CBA") vested the retiree welfare benefits for life. Skinner, 1999 U.S. App. LEXIS 18488, at *6-9. The plaintiffs relied primarily on some ambiguous language in the CBA (e.g. "will continue," "shall remain") and the Sixth Circuit's Yard-Man inference of lifetime vesting. Skinner, 1999 U.S. App. LEXIS 18488, at *18.

In a sweeping rejection of the Yard-Man inference, the Third Circuit's holding framed and addressed precisely the questions before this Court. First, the court reasserted the Congressional intent that retiree welfare benefits remain non-vested unless specifically vested through contract, noting the Court's affirmation of that axiom in Curtiss-Wright Corp. v. Schoonejongen. Skinner, 1999 U.S. App. LEXIS 18488, at *18, 45.

Second, the appeals court held that such vesting by contract must be in clear and expressed language as proven by the union or employees, with the CBA and the question of vesting subject to the traditional laws of contract interpretation. Skinner, 1999 U.S. App. LEXIS 18488, at *23. As noted earlier, the Third Circuit's position here is wholly inapposite to the Board's approach. Moreover, the court held that these

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Management Relations Act ("LMRA"), and (2) employee representation is expressly provided for in the administration of trust funds under § 302 of the LMRA. Id. at 177. In the NLRB's Order in this case, however, the Board selectively ignored this substantial history by claiming that any court decisions which speak to ERISA and/or benefits language are "inapposite" because they concern ERISA violations, contract violations, and other matters which are arguably unrelated to Section 8(a)(5) violations. PA-A, at 4(a), n.9. That statement is remarkable in light of (1) the NLRB's earlier use of any statutes which supported its position in Pittsburgh Plate Glass, and (2) this Court's deliberate, methodical effort in Pittsburgh Plate Glass to reconcile concerns arising from the NLRA with those born from alternative labor laws and contract principles.

> cautionary principles apply without regard as to whether the employee welfare benefits are provided under a collective bargaining agreement, SPD, or other plan document....

Skinner, 1999 U.S. App. LEXIS 18488, at *13-18.

Third, since a presumption of vesting for retiree welfare benefits cannot be found in federal labor policy and is in fact contrary to such policy as revealed in ERISA, the Third Circuit wholly discredited the Yard-Man inference. In addition, directly addressing the Board's misuse of Pittsburgh Plate Glass, the court then joined the Seventh Circuit in holding that the distinction between permissive and mandatory subjects of bargaining is irrelevant in creating a presumption of vesting. Skinner, 1999 U.S. App. LEXIS 18488, at *23; Bidlack v. Wheelabrator Corp., 993 F.2d 603, 609 (7th Cir. 1993) (en banc). Indeed, the court found the active versus retired employee distinction similarly unimportant. The court noted that since most, if not all, plaintiffs in these actions were active employees at the time retiree welfare benefits were created and maintained,

> those who fear that their unions will not bargain for continued benefits for retirees need only see to it that specific vesting language protecting those benefits is incorporated in collective bargaining agreements.

Skinner, 1999 U.S. App. LEXIS 18488, at *23.

Fourth, the court in Skinner rejected the union's and retirees' claims without relying on reservation of rights language in the SPDs. Rather, the court held that absent affirmative language in the CBA or plan documents vesting such benefits, they remain non-vested for both active and retired employees. Skinner, 1999 U.S. App. LEXIS 18488, at *41. In addition, the court asserted that the mere fact of corporate largesse, i.e., the long term unilateral provision of such benefits, does not cause retiree welfare benefits to become vested. Id. at *45, 50-55. The facts in Skinner are indistinguishable from the present case. Indeed, here the Agreement was completely silent as to retiree welfare benefits, and the Company had affirmatively stated the right to terminate or change the benefits in the SPDs.

In sum, the Third Circuit in Skinner expressly aligned itself with the Fifth, Seventh and Eighth Circuits, in opposition to the First, Fourth, Sixth and Eleventh Circuits, in holding that in a union setting, absent a clear and expressed contractual ceding by the

employer, retiree welfare benefits are non-vested and subject to unilateral change. More importantly, Skinner is wholly inapposite to the Board's strained use of both the waiver analysis and this Court's narrow holding in Pittsburgh Plate Glass to transform retiree welfare benefits into a vested status by virtue of the duty to bargain. The conflict here at every level is clear, pervasive and irreconcilable absent intervention by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Respectfully submitted this 3rd day of September, 1999.

APPENDICES

APPENDIX A

Georgia Power Company and International Brotherhood of Electrical Workers Local 84, AFL-CIO-CLC

Case 10-CA-28441

NATIONAL LABOR RELATIONS BOARD

1998 NLRB LEXIS 143; 157 L.R.R.M. 1245; 1997 NLRB Dec. (CCH) 16431; 325 NLRB No. 59

March 10, 1998

[*1] DECISION AND ORDER

By William B. Gould IV, Chairman; Sarah M. Fox, Member; Peter J. Hurtgen, Member.

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary. National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

OPINION:

On February 14, 1997, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, n1 and conclusions and to adopt the recommended Order as modified. n2

----------Footnotes----------

n1 The Respondent has excepted to some of the judge's credibility findings.

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge inaccurately stated that unit and non-unit employees have received the same medical coverage since 1991. In fact, as the judge later noted, although the two groups of employees have been covered under the same plan during that period, they received somewhat different benefits. Further, contrary to statements in the judge's decision that might suggest otherwise, the Respondent only bargained with the Union over benefits as applied to current employees. Those minor mischaracterizations do not affect the overall accuracy or validity of the judge's decision. [*2]

n2 We shall modify the judge's recommended Order in accordance with our decisions in Indian Hills Care Center, 321 NLRB 144 (1996), and Excel Container, Inc., 325 NLRB No. 14 (Nov. 7, 1997).

The Union represents a bargaining unit of certain of the Respondent's employees. For many years, the Respondent's currently working and retired employees have been covered by medical and life insurance programs. The parties have bargained over those benefits as applied to currently working unit employees; however, the relevant collective-bargaining agreement (styled memorandum of agreement, or MOA) did not include or refer to those benefits. The parties have never negotiated over benefits for current retirees or over future retirement benefits for active unit employees. Indeed, the Respondent has refused the Union's earlier attempts to bargain over retiree benefits and has frequently made unilateral changes in those benefits, with the apparent acquiescence of the Union.

On April 21, 1995, the Respondent announced that it would limit the company-paid [*3] portion of the premiums for medical and life insurance coverage of employees who retire after January 1, 2002, with certain exceptions not material here. The limitations would not affect current retirees. It is undisputed that the Respondent took this action unilaterally and without affording the Union an opportunity to bargain over the announced changes.

The judge found that the Respondent's actions violated Section 8(a)(5) and (1) of the Act. In so doing, he found that the future retirement benefits of currently active unit employees were

mandatory bargaining subjects and that the Union had not waived its right to bargain over the changes.

We agree with the judge on both counts. We note initially that the Board in Midwest Power Systems, Inc. n3 recently reaffirmed its long-held view that future retirement benefits of currently active unit employees are mandatory bargaining subjects, and that unilateral changes in those benefits violate Section 8(a)(5). n4 Here, as in Midwest Power Systems, the prospectively announced changes in retirement benefits will affect currently active unit employees who will retire on or after the announced implementation date, and therefore were [*4] mandatory bargaining subjects. The Respondent's arguments to the contrary in this case are thus without merit. n5

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n3 323 NLRB No. 61 (Apr. 4, 1997), remanded on other grounds (mem.) Midwest Power Systems, Inc. v. NLRB, No. 97-1251 (D.C. Cir. Feb. 18, 1998).

n4 The Board noted that although the Supreme Court in Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971), held that an employer is not required to bargain over benefits for already retired employees, the Court also stated that "the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining." Id. at 180.

n5 The Respondent also contends that, in any event, the changes in future retirees' benefits do not "vitally affect" active unit employees, and therefore that it was not required to bargain over those changes. The Board rejected that same argument in Midwest Power Systems, finding the "vitally affects" doctrine inapplicable to the situation of current employees with a direct interest in their future retirement benefits. 323 NLRB No. 61, slip op. at 4.

The Respondent further argues that the number of employees who may eventually be affected by the unilateral changes in retiree benefits is too small to support a finding that the changes were substantial and material. We also reject this argument. As the Board noted in Torrington Co., 305 NLRB 938 (1991), if a change involves the terms and conditions of employment of unit employees, it is a mandatory bargaining subject even if only a relatively few employees are affected. Id. at 939 fn. 7.

[*5]

Concerning the waiver issue, we note that waivers of statutory rights are not to be lightly inferred, but instead must be "clear and unmistakable." n6 Even when an employer relies on contract provisions in an attempt to show that a union has waived its right to bargain over an issue, either the contract language relied on must be specific or the employer must show that the issue was

fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter. n7 Here, however, there is no relevant contract language. n8 The MOA does not refer to medical or life insurance benefits. And the "reservation of rights" language in the benefit plans, which reserves to the Respondent the right to amend or terminate the plans at any time, was never the subject of collective bargaining before the changes at issue were announced. In these circumstances, we cannot find that the Union clearly and unmistakably waived its right to bargain over the changes in post-retirement benefits for current employees. n9

[*8]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Georgia Power Company, Atlanta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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n6 Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) [*6]

n7 Trojan Yacht, 319 NLRB 741, 742 (1995); Angelus Block Co., 250 NLRB 868, 877 (1980).

n8 The Respondent does argue that the judge failed to give any weight to the MOA's management-rights clause. In this the judge plainly did not err. The management-rights clause states that: The right to hire, discipline, and/or discharge employees for reasonable or sufficient cause, and the full right of management of the properties is reserved to and shall be vested exclusively with the Management of the Company. Such rights shall include, but not be limited to, the right of Management to determine at any and all times how many men it will employ or retain, together with the right to exercise full control and discipline in the interest of proper service, operation, and efficient and economical conduct of its business, subject to the other provisions of this Agreement. The foregoing rights shall be subject to arbitration under the provisions of Article XIII only to the extent that they are modified or limited by other specific provisions of this Agreement. (Emphasis in the original.)

General language of this sort is insufficient to establish a waiver of the Union's right to bargain over the changes in question. See Metropolitan Edison, 460 U.S. at 708. [*7]

n9 In reaching this conclusion, we do not rely on Union Business Manager Doyle Howard's apparent subjective unawareness of the "reservation of rights" language. The written plans were in the Union's possession, and the language had been included in the plans for years.

The Respondent relies on numerous court decisions holding that, under ERISA, the language of benefit plans is controlling. See, e.g., Murphy v. Keystone Steel & Wire Co., 61 F.3d 560 (7th Cir. 1995); UPIU v. Jefferson

Smurfit Corp., 961 F.2d 1384 (8th Cir. 1992). Those decisions are inapposite, because they concerned alleged violations of ERISA, alleged contract violations, and other matters. They did not involve alleged violations of Sec. 8(a)(5) of the Act, over which the Board has primary jurisdiction. See Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 552-553 (1988).

That the Union did not protest or demand to bargain over previous unilateral changes in retirement benefits does not require a different result. The Board has consistently held that a union that acquiesces in an employer's unilateral changes in terms and conditions of employment does not irrevocably waive its right to bargain over such changes in the future. Midwest Power Systems, slip op. at 4. Nor does the Union's failure to grieve or otherwise protest the Respondent's earlier refusals to bargain over retirement benefits establish that the Union has waived its bargaining rights. See Air Vac Industries, 282 NLRB 703 (1987). Thus, even if the actions acquiesced in by the Union could be construed as applying to current unit employees rather than retirees, the Union still did not waive its right to bargain over the changes at issue here.

1. Substitute the following for paragraph 2(c).

"(c) Within 14 days after service by the Region, post at copies of the attached notice marked "Appendix." n3 Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by [*9] the Respondent at any time since April 21, 1995."

Dated, Washington, D.C. March 10, 1998

William B. Gould IV, Chairman

Sarah M. Fox, Member

DISSENT BY: HURTGEN (In Part)

DISSENT:

MEMBER HURTGEN, dissenting in part and concurring in part.

I agree with my colleagues only in certain respects. The plan documents gave Respondent the right to "alter, amend or

terminate" the plan for any reason. This language, as amplified by Union acquiescence in prior changes, clearly waived the Union's right to bargain about the change announced on April 21. However, the plan, and its waiver, were not incorporated into any contract. Thus, the Union was free to withdraw the waiver at any time. On April 21, and again on May 9, the Union requested bargaining about the change. In my view, the effect of these requests was to make it clear that the waiver was being withdrawn. Accordingly, Respondent was obligated to bargain about the Union's request that the April 21 change be rescinded. n1

In sum, Respondent [*10] was privileged to make the change of April 21, but was not privileged to refuse to bargain on and after April 21 about rescinding that change.

Dated, Washington, D.C.

Peter J. Hurtgen, Member

Katherin Chahrouri, Esq., for the General Counsel.
Laura Kriteman, Esq. and Bentina Chisolm, Esq., of Atlanta, Georgia, for the Respondent.
J. Michael Walls, Esq., of Atlanta, Georgia, for the Charging Party.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 The change would not become effective until 2002

Decision

WILLIAM N. CATES, Administrative Law Judge. This hearing was on November 18, 1996 n1, in Atlanta, Georgia. The charge was filed on May 5, 1995. The complaint issued on August 10, 1995.

I. JURISDICTION

Respondent, is a Georgia corporation with it principal place of business in Atlanta, Georgia, where it is engaged in the business of generating and distributing power utility services. During the past year, a representative period, [*11] it purchased and received at its Atlanta, Georgia facilities goods valued in excess of $ 50,000 directly from suppliers located outside the State of Georgia. Respondent admitted and I find that at all times material herein it has been an employer engaged in commerce as defined in the National Labor Relations Act (the Act).

The parties stipulated that Respondent is a wholly owned subsidiary of the Southern Company. Other wholly owned subsidiaries of the Southern Company include Mississippi Power

Company, Alabama Power Company, Savannah, Gulf Power, and SEI.

II. LABOR ORGANIZATIONS

Respondent admitted that International Brotherhood of Electrical Workers Local 84, AFL-CIO-CLC (Union, IBEW or Local) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

It is alleged that Respondent unilaterally changed working conditions for employees represented by the Union.

Business Manager and Financial Secretary of the Union Doyle Howard testified that the Union has had a collective-bargaining relationship with Respondent since back in the 1920's. The Union currently represents a unit of some 5000 employees.

This litigation deals with retirement [*12] benefits that are called OPRB (Other Post-Retirement Benefits).

Respondent admitted that on or about April 21, 1995, it announced changes to retirement benefits without bargaining with the Union; that it was at material times party to a collective-bargaining agreement with the Union; and that the Union is the exclusive collective-bargaining representative of its employees in an appropriate bargaining unit described at article II, section 2 of that agreement (Memorandum of Agreement).

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n1 The hearing originally opened on February 2, 1996, before Administrative Law Judge Albert A. Metz. At that time the hearing was postponed pending settlement negotiations.

Respondent's April 21, 1995, announcement made to its managers is as follows:

I'd like to inform you of several changes we're making in retiree life and medical benefits that will affect many future retirees. The changes will be communicated to all employees in the next issue of The Citizen Weekly, which will be mailed Monday, April 24, I've attached an advance copy of those articles. Please review this information thoroughly so that you'll be familiar with the changes in case you receive questions from employees. Although covered more completely in the attachments, there are several points that need to be emphasized:

The major changes

A maximum ceiling is being established for the company-paid portion [*13] of the cost of coverage - often referred to as premiums - for retiree life and medical coverage. (Specific limits have been approved and are included in the attached.) The level of company contributions will be tied to length of service (Specific levels for each year of service have not been approved and will be communicated later.)

Transition period for the changes

The changes do not impact those in the following groups:

Current retirees;

Any employee who has at least 30 years of accredited service (as defined in the pension plan) on or before January 1, 2002; or Employees age 55 or over as of January 1, 2002, with 15 years of accredited service.

The changes apply to all other employees not covered in the groups above. Generally, this includes those who become retirement eligible after January 1, 2002.

Reasons for the changes

To adjust for changes in accounting rules, which have led to an increase in accounting costs for these benefits of about $ 70 million annually for the Southern Company.

To support the company's cost-competitive goals. It's important to keep in mind that, even with these changes, the company is maintaining a competitive and generous retiree benefits package. [*14] At a time when many companies are dramatically reducing or simply eliminating retiree medical and life insurance benefits altogether, we are adopting a solution that both clarifies our commitment to retiree benefits and continues to provide our retirees access to these benefits. As we continue to review our benefits practices, changes to these and other benefits plans may be necessary in the future.

The Respondent called the principal of compensation of benefits of The Southern Company, David Settle. Settle testified that the driving force behind Respondent's April 21, 1995 changes in OPRB was a change in Federal Accounting Standard 106. Effective with FAS 106 companies must account for retirement cost as a liability while the employee is in active service. Formerly that liability could be shown during retirement rather than while the employee was in active service. FAS 106 does not apply to pension plans but it applies to welfare benefits that would include

life and medical insurance. Settle agreed that the new FAS 106 requirements applied to current employees regarding future retirement rather than to current retirees.

The parties are not in dispute regarding a matter mentioned [*15] by Respondent in its opening argument. Respondent commented, in part, regarding the parties relationship regarding other post retirement benefits (OPRB):

Retiree benefits have been offered by the company for decades, as have benefits to active, covered (unit) and non-covered employees. Up to 1978, all employees and retirees were covered under one medical plan.

In 1978, the plan offered was the Provident Plan. In 1978-79, the medical plan split, with the Union employees voting to take coverage under Blue Cross/Blue Shield; and the non-covered (non-unit) employees and retirees remaining with the Provident Plan . . .

Unit and nonunit employees have again received the same medical insurance coverage since the 1991 collective-bargaining agreement. Business Manager Howard testified that although unit employees rejected going under the same plan with non-unit employees in 1989, they joined in the same plan 2 years later.

Lynn Martin, who was employed in Respondent's compensation benefits department, testified regarding the different plans. Martin testified that she was involved in negotiations with the Union from 1991. She testified that at times since 1978 the benefits plans for active [*16] and retired employees have not always been the same. In 1989 Respondent adopted the "Provident Plan" in-house that covered active nonunit employees and retirees. In 1989 unit employees were covered by Blue Cross/Blue Shield. The Union terminated its Blue Cross/Blue Shield coverage in 1991 and agreed to join other employees and retirees in the Provident Plan. However, differences in coverage have remained for unit and nonunit employees. For example unit employees were not initially covered for prescription drugs in 1991. From 1991 through January 1, 1993, separate lists were maintained for 100 percent outpatient surgeries. During 1992 there was a different premium structure for family coverage between nonunit and retirees and unit employees. Currently unit employees are covered under a life insurance policy issued by Provident Life and Accident Insurance. Nonunit and retirees whether formerly unit or nonunit employees, are covered by a Metropolitan Life Insurance policy.

In 1996 there was a change in pension plans. Respondent's witness David Settle testified that nonunit employees may now retire at age 50 with 10 years' service. The Union declined to accept that change in eligibility [*17] for unit employees.

Respondent contends: (1) that the Union has waived bargaining over the OPRB by historically permitting Respondent to make changes without bargaining; and (2) that the Union specifically waived bargaining through a clause contained in the benefits package.

(1) Have the parties historically bargained about retirement benefits

Respondent contended that since 1978 it has made changes to medical benefits provided to retirees and nonunit employees without bargaining with the Union and without receiving requests or demands to bargain over those changes.

Doyle Howard agreed that unit employees had a different insurance plan from 1979 to 1991. Nonunit employees and retirees had the same plan. During that period the Respondent made changes to the nonunit employees and retirees' insurance without negotiating with the Union.

Lynn Martin testified that Respondent has never negotiated with the Union over future retirement benefits for active unit employees. She recalled that Respondent has made changes to retirees' benefits and that those changes have not been negotiated with the Union. The Union has never negotiated retirees' benefits.

Rueben Pierce Head, who retired from Respondent [*18] in 1984, confirmed that Respondent and the Union did not negotiate over retirees' benefits. Head was Respondent's chief negotiator between 1975 and 1986. He recalled that the Union made inquiries during those years about present retired employees. Head did not object to those discussions but he never agreed those were negotiable matters. During 1980 the Union requested information including retiree information. Head's response to the Union dated August 18, 1980, included a comment that the retiree information concerned a nonnegotiable item. However, Head noted that he was supplying the Union with the summary plan description for retired employees.

Gene Ussery was Respondent's manager of labor relations from May 1992 until October 1995. Ussery testified that Respondent did not negotiate with the Union over benefits for nonunit employees and retirees. He testified that to his knowledge

negotiations did not involve future retirees' benefits. Before April 1995, the Union did not seek to negotiate with Respondent for the medical benefits that active unit employees would have if those employees retired from Respondent. He recalled that Doyle Howard used to joke that he was negotiating on [*19] behalf of Ussery on occasions when Respondent offered to extend whatever had been negotiated with the Union to nonunit employees and retirees.

Business Manager Howard testified that medical and life insurance benefits are included in the total compensation package that the Union negotiated with Respondent and that total compensation package includes medical insurance for current employees who later retire. Howard testified that to his knowledge Respondent never attempted to change its practice of paying full medical insurance premiums for employees who later retired, until April 21, 1995.

According to Howard, although medical and life insurance benefits have been negotiated for unit employees those benefits have never been mentioned in the collective-bargaining agreement. Occasionally negotiations for medical and life insurance benefits occurred during regular contract negotiations. On other occasions those negotiations were held separately from the regular contract negotiations.

It is the parties' practice to negotiate only proposed changes. The parties do not negotiate over contract items when the particular items are not included in a proposed change.

During the most recent negotiations [*20] Respondent proposed changes regarding medical and life insurance. There was no agreement and that matter was postponed. Doyle Howard testified that an example of Respondent and the Union negotiating changes in medical insurance occurred in 1991 when the parties negotiated an agreement to include coverage for prescription drugs. Before that time drugs had not been included in health insurance for unit employees. Howard recalled that change covered both current unit employees and unit employees who would later retire. Benefit changes were also negotiated in 1993.

The General Counsel introduced documents to support its contention that the parties have negotiated medical and life insurance benefits.

In a document entitled "Company Package Proposal Submitted to the Union Committee, December 1, 1977," Respondent proposed

to modify the insurance program to provide additional life and medical coverage. That document also includes a proposal to revise the pension plan to:

Revise Pension Plan to include all full-time Union representatives, who are employees of the Company, on a leave of absence provided the entire cost is borne by Local Union # 84 as sole bargaining representative, as submitted [*21] to the Union on August 5, 1977.

Doyle Howard identified Respondent's description of the settlement for a 3-year contract. That document, "Resume of Georgia Power Company-I.B.E.W. Negotiations with Respect to Working Conditions and Rates of Wages," is dated August 24, 1987. It contained a provision whereby the Respondent agreed to contribute more toward medical insurance premiums on increases in those premiums expected in October 1987 and 1988. It outlines the insurance program under "Summary of Economic Proposals."

In a 1989 resume of negotiations signed by Respondent's manager of labor relations, there is an indication that Respondent asked the Union Committee if it had decided to rebid the insurance coverages of covered (unit) employees. That document shows there were design changes agreed to by the Union including improved control of psychiatric and substance abuse treatment and chiropractic treatment plus the deletion of the mandatory second opinion for proposed surgeries. Howard testified that the insurance agreement applied to current employees and to insurance benefits that the employees would receive upon retirement.

In a memorandum of understanding signed by the Union and [*22] Respondent on April 26, 1990, there is a provision providing for life insurance equal to three times the employees annual salary. That provision includes a program for the payment of life premiums from Company and employee reserves. Following that provision is the following paragraph: After the Company and the employee reserves are utilized as set forth above the parties agree to negotiate issues of funding and continuation of coverage including but not limited to, the amount of coverage, setting new experience rated rates and what percentage of that rate will be paid by the Company and by the employees, respectively.

In a package proposal presented to the Union by Respondent on January 14, 1991, in the context of contract negotiations, Respondent proposed several modifications to the medical insurance program. That proposal also provided that Respondent was agreeable to make the changes in the medical insurance plan

retroactive to January 1, 1991, if the contract was approved. Under Respondent's January 1991 proposal both noncovered and covered (unit) employees would receive the same medical insurance. Howard testified that the parties agreed to insurance changes that applied [*23] to current employees and current employees who later retired.

On November 12, 1992, Respondent wrote the Union and included 5500 copies of their summary of proposed benefit changes for January 1, 1993. Those copies were submitted in order to permit the Union to mail them to its unit employees for a vote on the proposals. The proposals had been negotiated between the Union and the Respondent. According to Doyle Howard the parties agreed during negotiations that those proposed changes applied to current employees and to current employees who might later retire.

On February 2, 1992, the Union and Respondent signed a memorandum of understanding, medical benefits in which Respondent agreed to amend the schedule of benefits to provide unit employees 100 percent surgical coverage in accord with a schedule.

On April 5, 1994, Respondent wrote the Union and included 4600 copies of the summary of medical plan options effective June 1, 1994 for mailing to unit employees. The summary had been agreed to by the Union and Respondent subject to vote by the unit employees.

On May 12, 1995, the Union and Respondent signed an agreement to provide specific coverage for treatment of varicose veins. Howard [*24] testified that represented an agreement to re-include the varicose veins coverage. On that same date the parties signed an agreement for reimbursement for non network physicians.

Findings

The record showed that Respondent and the Union have negotiated on numerous occasions regarding welfare benefits for unit employees. The record also shows that Respondent frequently considered retirees and nonunit employees separate from unit employees for the purpose of welfare considerations. Before 1991 nonunit employees and retirees were covered under a different medical insurance plan from the unit employees. During the period before 1991 Respondent made changes to the plan for nonunit employees and retirees without bargaining with the Union.

On occasion the Union requested negotiations regarding retiree benefits and frequently Respondent refused to engage in those negotiations on the claim that retiree benefits were not negotiable.

In making my findings herein I credit the testimony of Doyle Howard that shows that Respondent frequently told the Union that negotiated benefits would be applied to retirees. I make that credibility determination on the basis of Howard's demeanor and the full record. [*25] The testimony of Gene Ussery, Respondent manager of labor relations until October 1995, supports my findings by showing that Respondent did offer to extend some unit employees' benefits to retirees.

The record including especially the testimony of Reuben Pierce Head shows that Respondent frequently discussed and provided the Union with information regarding retirees' benefits. I am also convinced and credit the testimony showing that Respondent frequently told the Union that retirees' benefits were not negotiable. I make that decision on the basis of the full record.

I credit the testimony of Lynn Martin that Respondent has never negotiated with the Union over future retirement benefits for active unit employees. Martin testified that at times since 1978 the benefits plans for active and retired employees have not always been the same. In 1989 Respondent adopted the "Provident Plan" in-house that covered active nonunit employees and retirees. In 1989 unit employees were covered by Blue Cross/Blue Shield. The Union terminated its Blue Cross/Blue Shield coverage in 1991. However, differences in coverage have remained for unit and nonunit employees. For example unit employees were not [*26] initially covered for prescription drugs in 1991. From 1991 through January 1, 1993, separate lists were maintained for 100 percent outpatient surgeries. During 1992 there was a different premium structure for family coverage between nonunit and retirees and unit employees. Currently unit employees are covered under a life insurance policy issued by Provident Life and Accident Insurance. Nonunit and retirees whether formerly unit or nonunit employees, are covered by a Metropolitan Life Insurance policy.

I also credit Doyle Howard's testimony that Respondent never advised the Union of its intention to change its practice of paying full medical insurance premiums for employees who later retired until April 21, 1995.

An employer has a duty to bargain over terms and conditions of employment for bargaining unit employees. However, an

employer has no duty to bargain regarding current retirees. Respondent contends that the instant matter involves bargaining over benefits for retirees and that it did not make changes in terms and conditions of employment of present members of the bargaining unit. See for example Murphey Diesel Co., 184 NLRB 757, 763 (1979); [*27] Civil Service Employees Assn., 311 NLRB 6, 7 (1993). Respondent argued that courts have refused to hold that decisions that are merely tangential to the rights of present members of the bargaining unit constitute mandatory subjects of bargaining. See for example Pittsburgh Plate Glass Co. v. NLRB, 404 U.S. 157 (1971); Keystone Steel & Wire v. NLRB, 41 F.3d 746 (D.C. Cir. 1994); Torrington Co., 305 NLRB 938 (1991).

There is a clear difference between bargaining over future retirement benefits for active employees and benefits for current retirees. Here the discussion involves employees that will not retire before 2002. As shown above the changes mentioned in Respondent's OPRB Update affect the premiums to be paid by employees that retire after January 1, 2002, and were not grandfathered into the previous plan. Those employees grandfathered into the current (previous) plan include those that retire on or before January 1, 2002, those that are 55 with 15 years' service on January 1, 2002, and those with 30 years service before January 1, 2002.

Obviously current retirees, [*28] having retired before January 1, 2002, fall within the above exceptions and are not affected by the OPRB changes. As shown above David Settle testified that FAS. 106 apply to current employees regarding future retirement rather than to current retirees.

The OPRB changes involve bargaining unit employees. They do not involve retirees and as such do not involve nonmandatory subjects of bargaining. Moreover, since the unit employees are not retirees or other nonstatutory employees, the "vitally affects" test is not applicable. Pittsburgh Glass, supra.

Even though the OPRBs are not included in the parties contract, Respondent has an obligation to bargain in good faith before instituting the changes. St. Vincent Hospital, 320 NLRB 42 (1995).

(2) Does the language of the plan documents permit Respondent's action?

Lynn Martin testified that there are reservation of rights clauses in plan documents for unit, nonunit, and retirees. According to

Martin Doyle Howard did object to that language during a September 1995 negotiation meeting.

The reservation of rights reads as follows:

AMENDMENT AND TERMINATION OF PLAN

Amendment of [*29] Plan. The Vice President of Human Resources of the Company shall have the right at any time by instrument of writing, duly executed, to modify, alter or amend, in whole or in part, the Plan, provided that any Covered Expense that has been incurred and has become payable as a Benefit but is unpaid shall not be affected by such amendment.

Termination of Plan. The Vice President of Human Resources of the Company shall have the right at any time by instrument of writing, duly executed, to terminate the Plan provided, however, that notice of such termination shall be furnished to Covered Employees.

As shown above the Union did not agree to the plan until 1991. The above language was included in the plan before that date. Moreover, as shown above, the Union never agreed to the same plan held by nonunit and retirees. As shown by Lynn Martin's testimony the Union terminated its Blue Cross/Blue Shield coverage in 1991 and agreed to join other employees and retirees in the Provident Plan. However, differences in coverage have remained for unit and nonunit employees.

Gene Ussery agreed that Doyle Howard objected to the reservation of rights language around September or October 1995. According [*30] to Ussery he sensed that Howard had been unaware of that language before that time Ussery responded that the reservation of rights language had been in the plan for many years and that he was surprised that Howard did not know of that language.

Findings

I credit the testimony of Lynn Martin showing that the Plan contained reservation of rights language similar to the above-quoted language, since at least 1989.

As shown above Gene Ussery agreed that Doyle Howard objected to the reservation of rights language around September or October 1995. According to Ussery he sensed that Howard had been unaware of that language before that time.

Respondent's witnesses Martin, Ussery, and Rueben Pierce Head could not recall a time when Respondent and the Union negotiated over the insurance plan reservation of rights language.

The fact that the current collective-bargaining agreement does not include the OPRB benefits and the inclusion of a reservation of rights clause in insurance plans without negotiation, does not constitute waiver of the Union's right to bargain. The evidence failed to show that the Union ever "consciously yielded" or "clearly and unmistakable waived" its interest in future [*31] retirement benefits. T.T.P. Corp., 190 NLRB 240 (1971). In fact, as shown above, the parties did not negotiate over the reservation of rights language until the Union objected to the language in 1995.

Language in the plan, without negotiations, does not provide a legitimate basis for Respondent to make a unilateral change in OPRB. Trojan Yacht, 319 NLRB 741 (1995).

The Respondent pointed out that its representatives frequently told the Union that it did not negotiate over retirees' health and life insurance benefits. However, the Respondent and the Union did negotiate over health and life benefits and oftentimes those benefits were extended to retirees.

I find that this matter must be distinguished from Electrical Workers IBEW v. Northeast Utilities, C.A. No. 92-30086-F, cited by the Respondent. In that action to enforce a collective-bargaining agreement the Court found that the collective-bargaining agreement did not contain a provision requiring the employer to maintain health coverage. Here the situation is similar to that in Trojan Yacht, supra. In Trojan Yacht where there were [*32] applicable collective-bargaining provisions, the Board held that in "order to establish a waiver of the statutory right to bargain over mandatory subjects of bargaining, . . . there must be clear and unmistakable relinquishment of that right." Trojan Yacht, 319 NLRB at 744.

Here unlike Trojan Yacht, there was no applicable collective-bargaining provisions. Therefore, the instant situation makes for an even stronger case for the General Counsel than Trojan Yacht.

Here credible evidence received through Respondent's witness Lynn Martin showed that the plan adopted by the Union in 1991 was not the exact same plan applicable to nonunit employees and retirees.

Moreover the testimony of Gene Ussery proved there was never a clear and unmistakable relinquishment of the right to bargain over future retirees OPRB. Ussery agreed that Doyle Howard objected to the reservation of rights language around September or October 1995. According to Ussery he sensed that Howard had been unaware of that language before that time.

Neither the parties' memorandum of agreement nor any other agreement between the parties, included terms that are "incisive, direct, and [*33] specific in their assault on the existence of any negotiating responsibility during the term of the contract, and their desire to commit unresolved issues to management prerogatives as they existed on entry of the agreement." Rockford Manor Care Facility, 279 NLRB 1170, 1174 (1986).

The record failed to establish there was a clear and unmistakable relinquishment of the right to bargain over OPRB changes. Trojan Yacht, 319 NLRB 741 (1995). The record proved that the Union did not waive its right to bargain over OPRB changes.

(3) Retirees are not entitled to receive a particular level of benefits

(4) OPRB Benefits are not vested

The Respondent argued that the Union has no right to maintain a particular level of benefits and that OPRB benefits are not vested, in light of ERISA. The Board has not held nor does the General Counsel seek in the instant matter, maintenance of a particular level of benefits. Nor is there a contention that OPRB benefits are vested. Instead the Board has held that an employer must offer bargaining before unilaterally changing benefits that affect unit employees. The Board found in Trojan Yacht, supra, [*34] that the employer must offer bargaining before deciding upon a precise change.

(5) The changes are not substantial and material

(6) The changes do not vitally affect benefits of active employees

The Respondent cited Civil Service Employees Assn., 311 NLRB 6 (1993), in arguing that the changes here are not material, substantial and significant. However, Civil Service must be distinguished. There the Board found there had been no actual unilateral change since the unilateral requirement that employees carry beepers did not materially change the practice of having employees call in and for it to call places listed on the itinerary. Here there was a clear unilateral change.

Respondent argued that the Board is bound by the "vitally affects" doctrine citing among others Pittsburgh Plate Glass Co. v. NLRB, 404 U.S 157 (1991). However, the Court in Pittsburgh Plate & Glass noted.

Be sure, the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining. 404 U.S. at 157, 180.

The Board has held: [*35] Changes in retirement benefits that affect current employees are a mandatory subject of collective bargaining, and a unilateral modification of such benefits, during the term of an agreement is in derogation of the bargaining obligation and constitutes and unfair labor practice. Titmus Optical Co., 205 NLRB 974, 981 (1973).

The Board has continued to find that future retirement benefits constitute a mandatory subject of bargaining. Britt Metal Processing, 322 NLRB 421 (1996); Able Contracting Co., 320 NLRB No. 140 (Mar. 29 1996). In view of the current state of Board decisions I find I cannot rule for Respondent in its contentions that the unilateral changes are not substantial and material or that they do not vitally affect benefits of active employees.

Conclusions

The record is not in dispute that the Union requested bargaining over OPRB changes announced by Respondent on April 21, 1995. Respondent rejected the Union's request on and after April 21, 1995. I find that Respondent has continued to refuse to bargain over its OPRB changes.

There is no dispute but that Respondent had a bargaining [*36] obligation with the Union. At issue is whether that obligation extended to the instant issue, i.e., the OPRB changes. In determining that issue I must question whether the alleged unilateral changes involve a mandatory subject of bargaining. NLRB v. Borg-Warner Corp., 356 U.S. 342, 349 (1957); NLRB v. Katz, 369 U.S. 736, 743 (1962).

The Board and courts, have held that pension plan benefits for future retirees is a mandatory subject of bargaining. T.T.P. Corp., 190 NLRB 240 (1971); Pittsburgh Plate Glass Co. v. NLRB, supra. As noted, for example, in United Hospital Medical Center, 317 NLRB 1279 (1995) "(h)ealth and life benefit plans are a mandatory subject of collective bargaining. They may not be altered or eliminated without bargaining to mutual agreement or to a good

faith impasse on such action. NLRB v. Katz." In as much as health and life benefit plans are mandatory subjects of bargaining and in as much as the Board and courts have concluded that pension benefit plans for future retirees are mandatory subjects of bargaining, [*37] I am persuaded that health and life insurance coverage in retirement is a matter relating to wages, hours, and other terms and conditions of employment such as to constitute a mandatory subject of bargaining.

Respondent argues that the distinction of importance is one involving employees and retirees. However, there is another distinct group involved in the instant dispute. In its April 21, 1995 notice Respondent discussed benefits for some employees that would first become eligible to retire on and after January 1, 2002 Obviously that group does not involve current retirees. That group would potentially involve some current unit employees. It is not possible to determine at this time which unit employees other than those in the excluded or grandfathered group, will fall within those affected by Respondent's April 21 notice. Nevertheless, it is apparent that retirement benefits are important conditions of employment for all unit employees that may first qualify for retirement after January 1, 2002.

I find that Respondent's April 21, 1995, announcement affects current unit employees. Only current employees and those that may be hired in the future may be affected by Respondent's OPRB [*38] changes. No current retirees may be affected as shown in Respondent's announcement. Those April 21 OPRB changes involve terms and conditions of employment of current unit employees.

By announcing its planned OPRB changes, announcing that the changes would be implemented and refusing to bargain regarding current unit employees' future retirement welfare benefits after the Union's request, Respondent failed to fulfill its bargaining obligation and thus violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Georgia Power Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers Local 84, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent, by unilaterally changing its other post retirement benefits (OPRB) for unit employees without bargaining

with the Union as representative of the employees in the bargaining unit described at article II, section 2 of their collective-bargaining agreement, has engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting [*39] commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent has illegally changed other post retirement benefits (OPRB) for bargaining unit employees without bargaining with the Union as representative, Respondent is ordered to restore OPRB to pre-April 21, 1995 status and upon request bargain in good faith with the Union regarding OPRB.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended. If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, [*40] Georgia Power Company, Atlanta, Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Making unilateral changes in bargaining unit employees' OPRB without providing notice of the proposed changes and adequate opportunity for the Union to bargain about those changes.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with International Brotherhood of Electrical Workers Local 84, AFL-

CIO-CLC as exclusive representative of the employees in the appropriate bargaining unit described in article II, section 2 of their collective-bargaining agreement (memorandum of agreement) and, if an understanding is reached, embody that understanding in a signed contract.

(b) Restore OPRB to the pre-April 21, 1995, level.

(c) Within 14 days after service by the Region, post at its facilities in Atlanta, Georgia, copies of the attached notice. n3 Copies of the notice, on forms provided by the Regional Director for Region 10, after being [*41] signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Within 21 days after service by the Region, file with the Regional Director, Region 10, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C. February 14, 1997

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL [*42] LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice. Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally change terms and conditions of employment including other post retirement benefits (OPRB) for employees in bargaining units represented by International Brotherhood of Electrical Workers Local 84, AFL-CIO-CLC, or any other labor organization.

WE WILL, on request of the Union, bargain collectively regarding other post retirement benefits (OPRB) as they may affect bargaining unit employees, with International Brotherhood of Electrical Workers Local 84, AFL-CIO-CLC, as the exclusive representative of the employees in the appropriate bargaining unit described at article II, section 2 of our memorandum of agreement.

WE WILL, within 14 days of this Order, restore other [*43] post retirement benefits (OPRB) for bargaining unit employees to the pre-April 21, 1995 level.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

GEORGIA POWER COMPANY

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.98-8454

NLRB No. 10-CA-28441

GEORGIA POWER COMPANY,

Petitioner, Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent, Cross-Petitioner.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, CLC Local No. 84,

Intervenor.

Petition for Review and Cross Application
for Enforcement of an Order of the
National Labor Relations Board

(March 8, 1999)

Before MARCUS, Circuit Judge, HILL, Senior Circuit Judge, and ADAMS*, District Judge.

ADAMS, District Judge:

AFFIRMED. See 11th Cir. R. 36-1.**

---

*Honorable Henry Lee Adams, Jr., U.S. District Judge for the Middle District of Florida, sitting by designation.

** 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX C

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

June 10, 1999

MEMORANDUM TO COUNSEL OR PARTIES

RE: 98-8454-EE Georgia Power Company v. NLRB
DC DKT NO: 10-28441-CA

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

Thomas K. KAHN, Clerk
Reply To: Irene Lumley (404) 335-6175

Encl.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.98-8454

GEORGIA POWER COMPANY,

Petitioner, Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent, Cross-Petitioner.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, CLC Local No. 84,

Intervenor.

- - - - - - - - - - -

Petition for Review and Cross Application
for Enforcement of an Order of the
National Labor Relations Board

- - - - - - - - - - - -

ON PETITION(S) FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ____F.2d____).

BEFORE: MARCUS, Circuit Judge, HILL, Senior Circuit Judge, and ADAMS*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

Stanley Marcus
UNITED STATES CIRCUIT JUDGE

*Honorable Henry Lee Adams, Jr., U.S. District Judge for the Middle District of Florida, sitting by designation.

Supreme Court, U.S.
NOV 10
OFFICE OF THE CLERK

(2)

No. 99-419

In the Supreme Court of the United States

GEORGIA POWER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner committed an unfair labor practice by unilaterally altering the post-retirement medical and life insurance benefits of current, active unit employees without bargaining first with the union.

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In the Supreme Court of the United States

No. 99-419

GEORGIA POWER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-2b) is unpublished, but the judgment is noted at 176 F.3d 494 (Table). The decision and order of the National Labor Relations Board (Pet. App. 1a-6a) and the decision of the administrative law judge (Pet. App. 6a-23a) are reported at 325 N.L.R.B. No. 59.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1999. A petition for rehearing was denied on June 10, 1999 (Pet. App. 1c-3c). The petition for a writ of certiorari was filed on September 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(d) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 158(d), provides, in pertinent part, that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to * * * confer in good faith with respect to wages, hours, and other terms and conditions of employment." Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." "[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 198 (1991).

In *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), this Court explained that, under the NLRA, "mandatory subjects of collective bargaining include pension and insurance benefits for active employees, and an employer's mid-term unilateral modification of such benefits constitutes an unfair labor practice." *Id.* at 159 (footnotes omitted). Although the Court concluded that the employer's bargaining obligation does not extend to a unilateral modification that "concerns, not the benefits of active employees, but *the benefits of already retired employees*" (*id.* at 160 (emphasis added)), the Court made clear that "*the future retirement benefits of active workers* are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining." *Id.* at 180 (emphasis added).

2. Petitioner generates and distributes electric power. For many years, petitioner has maintained a

bargaining relationship with Local 84, International Brotherhood of Electrical Workers, AFL-CIO (Union). The bargaining unit represented by the Union presently consists of approximately 5,000 employees. Pet. App. 6a-7a. Petitioner also employs workers who are not represented by a union. *Id.* at 9a. Historically, all of petitioner's active employees and retirees have been covered by medical and life insurance plans. *Id.* at 2a, 9a. Petitioner and the Union have bargained over medical and life insurance benefits for active unit employees. *Id.* at 2a, 11a-13a. However, the parties' collective bargaining agreements (styled "memorand[a] of agreement") have not included or referred to those benefits. *Id.* at 2a. The Union has also sought to bargain over medical and life insurance benefits for retired, former unit employees, but petitioner has regarded those benefits as "not negotiable," and it has frequently made unilateral changes to the benefits of retired employees, with the Union's apparent acquiescence. *Id.* at 2a, 14a.

On April 21, 1995, during the term of a collective bargaining agreement, petitioner unilaterally placed a limitation on the employer-paid portion of premiums for medical and life insurance benefits for current, active employees who will retire after January 1, 2002. Pet. App. 2a, 7a-8a. That new policy was not applicable to "current retirees." *Id.* at 2a, 8a. Petitioner imposed the limitation "[t]o adjust for changes in accounting rules, which have led to an increase in accounting costs for these benefits of about $70 million annually." *Id.* at 8a. The Union requested bargaining over the benefit changes on the same date that petitioner unilaterally announced them and reiterated that request thereafter. Petitioner, however, refused to bargain with the Union. *Id.* at 2a, 19a.

3. Acting on a charge filed by the Union, the General Counsel of the National Labor Relations Board (Board) issued a complaint alleging that petitioner committed an unfair labor practice by unilaterally changing the terms and conditions of employment of employees represented by the Union. Pet. App. 7a. After a hearing, the Board, in agreement with the administrative law judge, concluded that "[b]y announcing its planned [benefits] changes, announcing that the changes would be implemented and refusing to bargain regarding current unit employees' future retirement welfare benefits after the Union's request, [petitioner] failed to fulfill its bargaining obligation" under Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5). Pet. App. 1a, 20a; see also *id.* at 20a-21a. In so concluding, the Board applied its "long-held view," based on this Court's decision in *Pittsburgh Plate Glass Co.*, *supra*, that "future retirement benefits of currently active unit employees are mandatory bargaining subjects, and * * * unilateral changes in those benefits violate Section 8(a)(5)." Pet. App. 3a; see also *id.* at 3a n.4. The Board found that "the prospectively announced changes in retirement benefits will affect currently active unit employees who will retire on or after the announced implementation date, and therefore were mandatory bargaining subjects." *Id.* at 3a.

The Board rejected petitioner's contention that the Union, in the applicable memorandum of agreement (MOA) and benefit plan documents, had waived its right to bargain over changes in the benefits of currently active unit employees. Pet. App. 3a-4a. The Board reasoned that "waivers of statutory rights are not to be lightly inferred, but instead must be 'clear and unmistakable.'" *Id.* at 3a n.5 (quoting *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 708 (1983)). In regard to the MOA, the Board found that "there is no

relevant contract language" because "[t]he MOA does not refer to medical or life insurance benefits." The Board further reasoned that the "[g]eneral language" in the MOA's management-rights clause was "insufficient to establish a waiver of the Union's right to bargain over the changes in question." *Id.* at 4a & n.8. In regard to the benefit plan documents, the Board found that, although they contained language that "reserves to [petitioner] the right to amend or terminate the plans at any time," that language "was never the subject of collective bargaining before the changes at issue were announced." *Id.* at 4a. Accordingly, the Board concluded that the plan document provisions could not be deemed a relinquishment by the Union of "its right to bargain over the changes in post-retirement benefits for current employees." *Ibid.*[1]

Finally, the Board noted that, in attempting to justify its unilateral action, petitioner relied on "numerous court decisions holding that * * * the language of benefit plans is controlling" under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Pet. App. 4a-5a n.9. The Board found that petitioner's cases were "inapposite" because they "did not involve alleged violations of [Section]

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[1] The Board added that the Union "still did not waive its right to bargain" even though "the Union did not protest or demand to bargain over previous unilateral changes in retirement benefits." Pet. App. 4a-5a n.9. The Board explained that, "even if the actions acquiesced in by the Union could be construed as applying to current unit employees rather than retirees," "a union that acquiesces in an employer's unilateral changes in terms and conditions of employment does not irrevocably waive its right to bargain over such changes in the future." *Id.* at 5a n.9.

8(a)(5) of the Act, over which the Board has primary jurisdiction." *Ibid.*[2]

To remedy petitioner's unfair labor practice, the Board ordered petitioner to restore the unit employees' post-retirement medical and life insurance benefits "to the pre-April 21, 1995, level," and to bargain on request with the Union regarding those benefits. Pet. App. 4a, 21a-22a.

4. Petitioner filed a petition for review of the Board's order in the United States Court of Appeals for the Eleventh Circuit. The court of appeals summarily affirmed the Board's order in an unpublished decision. Pet. App. 1b-2b.

ARGUMENT

The court of appeals' unpublished, summary affirmance of the Board's order is correct and does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore not warranted.

1. The Board's decision in this case rests on a straightforward application of settled law. Applying the principle that "the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining" (*Allied Chem. & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180 (1971)), the Board found that petitioner's "changes in retirement benefits will affect

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[2] In a separate opinion, Board Member Hurtgen concluded that petitioner's refusal to bargain was an unfair labor practice on different grounds. He found that the Union had waived its "right to bargain about the change announced on April 21," but that petitioner nonetheless acted unlawfully by refusing "to bargain on and after April 21 about rescinding the change." Pet. App. 5a-6a.

currently active unit employees who will retire on or after the announced implementation date, and therefore were mandatory bargaining subjects." Pet. App. 3a & n.4. Because it was "undisputed" that petitioner altered those benefits "unilaterally and without affording the Union an opportunity to bargain over the announced changes," and because the Union had not waived its statutory right to bargain over those changes, the Board reasonably concluded that petitioner's unilateral conduct violated Section 8(a)(5) of the Act. *Id.* at 2a-3a. The Board's determination, which was summarily upheld by the court of appeals, raises no issue warranting further review.

2. Petitioner contends (Pet. 10-14) that the Board's decision is at odds with the congressional intent underlying ERISA. Petitioner notes (Pet. 10-12) that, under ERISA, medical and life insurance benefits (termed "welfare" benefits), unlike pension benefits, are not vested, in order to afford employers the flexibility to address unpredictable costs and economic variables. Therefore, petitioner asserts, it was free, under the reservation-of-rights clause in its benefit plan documents, to modify those welfare benefits without first bargaining with the Union. There is no merit to petitioner's contention.[3]

This Court has explained that, as a general matter, "welfare plans offer benefits that do not 'vest'" for purposes of ERISA. *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 514 (1997). That general ERISA principle, however, does

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[3] In this Court, petitioner has abandoned the contention, which was rejected by the Board, that its unilateral action was authorized by the management-rights clause of the MOA. See pp. 4-5, *supra*; Pet. App. 4a n.8.

not control the distinct NLRA issue presented by this case. Whether or not an employer is free under ERISA unilaterally to alter the non-vested benefits of employees who are not represented by a union, nothing in ERISA privileges an employer to ignore its obligation under the NLRA to negotiate with the union representative of current, active employees in a bargaining unit before unilaterally altering their terms and conditions of employment. Indeed, the text of ERISA itself makes clear that ERISA's provisions regarding employee rights under benefit plans do not override the independent rights and obligations established by the NLRA. See 29 U.S.C. 1144(d) (Subchapter I of ERISA "shall [not] be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States"). Simply put, an employee benefit may be both a non-vesting benefit under ERISA and a mandatory bargaining subject under the NLRA.

There is also no merit to petitioner's claim (Pet. 10-14) that the Board's decision in this case conflicts with this Court's ERISA decisions. Indeed, this Court has confirmed that ERISA and the NLRA place distinct legal duties on an employer. See *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988). In that case, the Court held that an employer's ERISA duty to make contractually promised contributions to a pension fund during the term of a collective bargaining agreement is distinct from the employer's duty under the NLRA to continue making such contributions after the agreement has expired and before completion of negotiations for a new contract. The Court explained that "[u]nilateral changes in the terms and conditions of employment are prohibited, not to vindicate the interests that motivated the enactment of [ERISA], but rather to carry out the

purposes of the NLRA," which entails "a broader labor law duty that was created to protect the collective-bargaining process." *Id.* at 553. The Board's decision in this case is entirely in keeping with that principle. None of this Court's ERISA decisions upon which petitioner relies concerns the relationship of ERISA and the NLRA.[4]

Petitioner is also incorrect in asserting (Pet. 14) that the Board "has used its primary jurisdiction over labor-management relations to create a vested right to future retiree welfare benefits." As the Board noted in its decision, the General Counsel did not contend in this case that the unit employees' benefits before April 21, 1995, were "vested." Pet. App. 18a. Nor did he contend that petitioner was required to maintain "a particular level of benefits." *Ibid.* "[T]o vest benefits is to render them forever unalterable," *UAW* v. *Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999), and nothing in the Board's decision renders "unalterable" the unit employees' benefits. Rather, the Board has simply ordered petitioner to bargain with the Union, using the

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[4] See *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 43 (1987) (addressing whether ERISA preempts certain state common law actions) (cited at Pet. 10); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 88 (1983) (addressing whether ERISA preempts state employment discrimination and disability benefits law) (cited at Pet. 10); *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 75-78 (1995) (addressing whether employer's reservation-of-rights clause "sets forth an amendment procedure that satisfies" ERISA's plan-amendment provisions) (cited at Pet. 11); *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 511-512 (1997) (addressing whether non-vesting benefits are protected by ERISA's prohibition against employer interference) (cited at Pet. 11, 12, 14); *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 891 (1996) (addressing whether "the act of amending a pension plan * * * trigger[s] ERISA's fiduciary provisions") (cited at Pet. 13).

benefit level before April 21, 1995, as a baseline for negotiations. See Pet. App. 21a. If, after good-faith negotiations, the parties reach a valid bargaining impasse, petitioner, consistent with the NLRA, may unilaterally implement benefit changes reasonably comprehended within its pre-impasse proposals to the Union. See *Advanced Lightweight Concrete Co.*, 484 U.S. at 543 n.5.[5]

3. a. Petitioner next contends (Pet. 14) that the "unanimous view" of the courts is that "standard reservation of rights provisions, such as those contained in the Company's Plan documents, are fully enforceable under ERISA and in Section 301 [of the Labor Management Relations Act, 1947, 29 U.S.C. 185,] breach of contract actions, and permit employers to unilaterally amend or terminate retiree welfare benefit plans," absent contractual language to the contrary. Accordingly, petitioner argues (Pet. 15), "the outcome would have been quite different" in this case if the Union had challenged petitioner's unilateral benefit changes in federal court under Section 301 or ERISA, rather than before the Board under the NLRA, because the Board "ignored the reservation of rights provisions [and] directly rejected the notion that any contractual rights were at issue." *Ibid.* Petitioner is incorrect.

The Board neither "ignored" the reservation-of-rights provision contained in the plan documents nor "rejected" the possibility that petitioner may have secured from the Union a contractual right unilaterally to change the unit employees' benefits. Rather, the

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[5] For the same reason, petitioner errs in contending (Pet. 27) that the Board "has relied on *Pittsburgh Plate Glass* to vest otherwise non-vested retiree welfare benefits, without even limiting the vesting to the expiration of the current labor agreement."

Board specifically examined the reservation-of-rights provision and the parties' collective bargaining agreement. The Board found that the agreement "does not refer to medical or life insurance benefits," and that "the 'reservation of rights' language in the benefits plans * * * was never the subject of collective bargaining." Pet. App. 4a. In those circumstances, the Board properly concluded that neither the unbargained-for reservation-of-rights provision in the benefit plans nor the collective bargaining agreement excused petitioner's obligation under the NLRA to bargain with the unit employees' union representative before changing their benefits. *Ibid.* Petitioner's disagreement with the Board's conclusion derives from its mistaken belief that ERISA preempts any bargaining obligation imposed on petitioner by the NLRA. See pp. 7-8, *supra*.

Nor is petitioner aided by any of the cases upon which it relies (Pet. 14-18). As we explain at pages 9-10, *supra*, the Board did not conclude in this case that an employer can never unilaterally change the benefits of its employees. Rather, the Board concluded only that an employer must bargain with the union representative of current, active employees before unilaterally changing their benefits, and that obligation is not relieved by reservation-of-rights language in a document that is not the product of collective bargaining. None of the decisions cited by petitioner addresses the questions that the Board decided in this case, and there is no reason to believe that the courts that issued those decisions would decide the questions in this case differently than the Board and the court below.

b. Petitioner also asserts (Pet. 18) that "[t]he Circuits are essentially split evenly on the effect, if any, a collective bargaining agreement has on both the vesting of future retiree welfare benefits, and the ability of an

employer to unilaterally change such benefits." See also Pet. 28-30 (making same claim). Whether or not petitioner's assertion of a conflict among the courts of appeals is accurate, this case does not present the question on which the cases cited by petitioner allegedly disagree. Those cases address the question whether the collective bargaining agreements at issue granted retired employees a vested right to receive lifetime health benefits.[6] Here, the Board did not address the rights of petitioner's retired employees under the collective bargaining agreement, and it did not decide whether any employee had vested rights to benefits. Rather, the Board concluded that petitioner violated its NLRA bargaining obligations toward its current, active unit employees by changing their post-retirement benefits without first bargaining with the union. See Pet. App. 2a-3a.

4. Petitioner further claims (Pet. 21-26) that the Board applied an erroneous legal standard in determining that the Union had not relinquished its right to

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[6] Compare, *e.g.*, *UAW* v. *Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983) (applying inference that "when the parties contract for benefits which accrue upon achievement of retiree status * * * the parties likely intended those benefits to continue as long as the beneficiary remains a retiree") (cited at Pet. 18, 28), cert. denied, 465 U.S. 1007 (1984); *Keffer* v. *H.K. Porter Co.*, 872 F.2d 60, 62 (4th Cir. 1989) (finding that parties "intended the benefits in question to extend beyond the expiration of the collective bargaining agreement") (cited at Pet. 18 n.7) with, *e.g.*, *Skinner Engine Co.*, 188 F.3d at 141 (interpreting "the relevant portions of the [collective bargaining agreements] without the benefit of the inference established by *Yard-Man*") (cited at Pet. 19 n.8, 28-29); *Murphy* v. *Keystone Steel & Wire Co.*, 61 F.3d 560, 567 (7th Cir. 1995) (labor agreements and plan documents negotiated by parties did not confer on retired employees a vested right to lifetime health benefits) (cited at Pet. 18).

bargain over the benefit changes at issue in this case. According to petitioner, the Board should have applied the "contract analysis" that has been applied by several courts of appeals rather than the "'clear and unmistakable waiver' analysis" that the Board used here. See Pet. 21 (citing, *e.g.*, *Chicago Tribune Co.* v. *NLRB*, 974 F.2d 933 (7th Cir. 1992)). Petitioner, however, is jurisdictionally barred from raising that claim in this Court, because petitioner failed to raise its objection before the Board. See 29 U.S.C. 160(e) ("No objection that has not been urged before the Board * * * shall be considered" on judicial review "unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665 (1982).[7]

This case would not present an appropriate vehicle for this Court to address petitioner's claim in any event, because the Union did not relinquish its bargaining rights even under the "contract analysis" now urged by petitioner. Under that analysis, "the contract will control" if the union has "agree[d] to the clause" in question and the clause "fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining." *Chicago Tribune Co.*, 974 F.2d at 937. Those conditions were not met here. As previously noted, the Board found that the reservation-of-rights clause in the benefit plan documents "was never the subject of

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[7] Before the Board, petitioner claimed that the administrative law judge had "erred in concluding that the Union never waived its right to bargain." Petitioner acknowledged that "such a waiver must manifest itself through 'clear and unmistakable' conduct," but contended that "the Company has amply shown that the Union has exhibited such conduct." Brief in Support of Respondent Georgia Power Company's Exceptions to Administrative Law Judge's Decision 41 (Mar. 17, 1997).

collective bargaining." Pet. App. 4a. Accordingly, the Union did not "agree[] to the clause." *Chicago Tribune Co.*, 974 F.2d at 937. Moreover, as the Board found (Pet. App. 4a), the parties' collective bargaining agreement did not contain any provision relating to medical or life insurance benefits. Accordingly, the agreement did not "fully define[] the parties' rights" in regard to those benefits. *Chicago Tribune Co.*, 974 F.2d at 937. Thus, the alleged disagreement on the governing standard for analysis of cases like this one would not have affected the outcome here.[8]

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[8] Petitioner also contends (Pet. 20-21, 24) that the Board's decision here conflicts with prior Board decisions that have applied "contract analysis." Even if petitioner were correct, the Board rather than this Court should resolve any inconsistency among the Board's decisions. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, there is no merit to petitioner's contention of conflict: the Board decisions petitioner cites do not suggest that benefit plan documents that are not the product of collective bargaining can authorize an employer to change the benefits of active employees without first bargaining with their union representative. See *McDaniel Ford, Inc.*, 322 N.L.R.B. 956, 963 (1997) (employer violated Section 8(a)(5) by unilaterally eliminating employee incentive plan, where the plan, though not included in the collective bargaining agreement, had been "applied to the mechanics for many years") (cited at Pet. 20-21); *Shane Felter Indus.*, 314 N.L.R.B. 339, 347 (1994) (employer violated Section 8(a)(5) by unilaterally reducing reimbursement rate for a prescription drug, where employer had "reimbursed claims for [the drug] at the rate [of] 100 percent for more than 3 years") (cited at Pet. 20); *Brown & Sharpe Mfg. Co.*, 299 N.L.R.B. 586, 615 (1990) (no duty to bargain over change in benefits of *retired* employees) (cited at Pet. 24); *Amoco Chem. Co.*, 328 N.L.R.B. No. 174 (Aug. 18, 1999), slip op. 2-3 (reversing administrative law judge's decision (cited at Pet. 24 n.11) based on Board's decision in the instant case), petition for review pending, No. 99-1368 (D.C. Cir.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 99-419

IN THE
Supreme Court of the United States

GEORGIA POWER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL NUMBER 84,
Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF INTERVENOR, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 84, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Should this Court review a decision of the National Labor Relations Board when Petitioner has failed in its attempt to show that the Board's decision is in conflict with ERISA, any decision of this Court or any decision from a Circuit Court of Appeals?

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IN THE

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GEORGIA POWER COMPANY,
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INTERNATIONAL BROTHERHOOD OF
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Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF INTERVENOR, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 84, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Intervenor, International Brotherhood of Electrical Workers, Local No. 84 (hereafter "Union" or "Local 84") opposes the Petition for Writ of Certiorari filed by Petitioner, Georgia Power Company (hereafter "Company" or "GPC") and for the reasons set forth herein, respectfully prays that the Writ be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

THE DECISION OF THE NATIONAL LABOR RELATIONS BOARD DOES NOT CONFLICT WITH ANY STATUTE, OR AUTHORITY FROM THIS COURT OR ANY CIRCUIT COURT OF APPEALS.

In this case, GPC made unilateral changes in employee retirement benefits which will take effect on January 1, 2002 and will apply only to employees who retire after that date. The benefits are set out in plan documents which contain a reservation of rights provision. That reservation of rights provision was not discussed between the parties at the time the Union and management agreed that Union-represented employees would receive benefits under that particular plan. In fact, at the time, neither the chief negotiator for the Union nor the chief negotiator for the Company were even aware of the existence of the reservation of rights clause. For at least twenty years prior to the change which is involved in these proceedings, the Union and Company bargained over benefits for current, active employees and, as a result of such bargaining, many changes had been agreed upon.

Based upon those facts, the National Labor Relations Board held that the Company had committed an unfair labor practice under Section 8(a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(5)[1] by unilaterally implementing changes in retirement benefits that would affect current, active employees when the Union had not waived its right to bargain over such benefits.

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[1] Section 8(a)(5) provides that:

> It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with representatives of his employees, subject to the provisions of Section 159(a) of this title.

In its Petition, GPC contends that the Board's decision is in conflict with the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, as well as decisions of this Court and various decisions from the Circuit Courts of Appeals. As we will show, however, all of the claimed conflicts are based upon either a totally irrelevant distinction between vested and non-vested benefits or upon a mischaracterization of the Board's holding as being applicable to benefits for current retirees, as opposed to current employees, or both. In fact, when properly viewed, the Board's decision is not in conflict with ERISA and is in every respect totally consistent with prior decisions of this Court.

A. There Is No Conflict Between the Board's Decision and ERISA.

Petitioner urges that, because the Board's decision requires the Company to bargain over changes in welfare benefits, it, in effect, gives such benefits the status of being vested. Petitioner then urges that the decision is therefore in conflict with ERISA because ERISA does not require vesting of welfare benefits. That contention is underpinned by a combination of defective reasoning and an inaccurate characterization of the record and it is incorrect.

In this case, the Board did nothing more than rule, consistently with well-established authority from this Court, that, since benefits are considered a part of wages [*Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971) (hereafter "*Pittsburgh Plate Glass*")] and since it is an unfair labor practice under Section 8(a)(5) of the NLRA for an employer to refuse "to meet . . . and confer in good faith with respect to wages" [*Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209-10 (1964)], GPC committed an unfair labor practice by refusing to bargain with the

Union over changes it made to the retirement benefits of current employees. The Board's decision did not require that any particular level of benefits be maintained and therefore, as a factual matter, it did not require vesting. Moreover, there is neither a logical basis nor any legal authority for concluding that simply requiring bargaining over a form of wages gives those wages a status of being vested.

More importantly, the very subject of vesting is simply a non-issue under the facts of this case. Petitioner cites no authority and, to our knowledge, no authority exists that holds that the character of whether wages are a mandatory subject of bargaining is dependent upon whether they are vested. In fact, GPC has historically bargained with the Union over current benefits for current employees and therefore has acknowledged that bargaining is required over welfare benefits for current employees. Thus, although GPC does not even attempt to articulate how or why such a difference exists, it is implicit that, under its position, the alleged vesting of welfare benefits conflicts with ERISA only if the affected employees are improperly characterized as current retirees. Unquestionably, however, the only affected persons in this case are current employees. Accordingly, even if one accepts GPC's flawed analysis, when it is properly applied to the record facts in this case, it does not support a conclusion that a conflict exists between the Board's decision and ERISA.

B. The Board's Reliance on *Pittsburgh Plate Glass* Does Not Conflict With Decisions of This Court and the Circuits; Nor is the Board's Reliance on *Pittsburgh Plate Glass* an Unauthorized Extension of This Court's Holding in That Case.

The Board cited *Pittsburgh Plate Glass* as support for its holding that retirement benefits for current, active

employees is a mandatory subject of collective bargaining. Contrary to Petitioner's contention, that holding is not in conflict with any decision of this Court, or to the knowledge of Intervenor's counsel, any decision of any Circuit Court of Appeals.

Petitioner contends that the recent case of *UAW v. Skinner Engine Co.*, No. 98-3461, 1999. U.S. App. LEXIS 18488, at *1 (3d Cir., Aug. 10, 1999), is in conflict with the Board's waiver analysis and this Court's holding in *Pittsburgh Plate Glass*. That position is without merit because, once again, it is predicated upon Petitioner's refusal to acknowledge that the affected persons in this case are current employees, not current retirees.

Skinner involved the elimination of retirement benefits to current retirees by their former employer. In that case, the Court of Appeals discussed extensively the fact that ERISA does not require that welfare benefits be vested and held that, because the benefits were not vested, the employer could eliminate them. Interestingly however, the Court in *Skinner* noted that, although ERISA did not require vesting of welfare benefits, an employer and its workers were certainly free to agree contractually to vesting of such benefits. *Id.* at *16. Thus, clearly the concept of bargaining over welfare benefits is not inconsistent with the Court's reasoning in *Skinner*. Much more importantly, however, because *Skinner* involved benefits of current retirees for whom wages are never a mandatory subject of bargaining (*see, Pittsburgh Plate Glass,* 404 U.S. at 166), and because the status of vesting has no relevance on the issue of whether a subject is a mandatory subject of bargaining, *Skinner* is dissimilar from the present case and therefore is not in conflict with the Board's ruling in this case.

Petitioner also contends that the Board made an unauthorized extension of this Court's holding in *Pittsburgh Plate Glass.* In that regard, Petitioner contends that this Court's statement in *Pittsburgh Plate Glass* that bargaining was required over retirement benefits for current active employees was dicta. That contention, however, is not supportable.

In *Pittsburgh Plate Glass,* this Court stated as follows:

> To be sure, the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining.

404 U.S. at 180.

The term "obiter dictum" is defined as

> words in a prior opinion that are entirely unnecessary for the decision of the case; . . . a remark made, or opinion expressed, by a judge, in his decision upon a cause "by the way", that is incidentally or collaterally and not directly, upon the question before him or a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy of argument.

Black's Law Dictionary (Rev. 6th Ed., 1990).

In *Pittsburgh Plate Glass,* the issue was whether retiree benefits were a mandatory subject of bargaining. The Court resolved that issue by holding that, generally, they were not. In so doing, however, the Court carved out an important exception and held that its ruling did not apply to future retirement benefits of active employees. A court determination that an exception exists to its ruling is hardly a gratuitous comment or a matter that has no bearing on the issue and therefore is not dicta.

Moreover, even if the portion of the opinion which was cited by the Board were dicta, the Board's holding that retirement benefits for current, active employees is a mandatory subject of bargaining which obligates an employer to bargain over them creates no conflict with any holding of this Court or the Circuit Courts of Appeals. This Court has specifically held that, because determinations regarding mandatory subjects of bargaining is at the core of the Board's function, "the Board's judgment on what is a mandatory subject is entitled to considerable deference." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979), *quoting Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 685-86 (1965). Therefore, separate and apart from its reliance on *Pittsburgh Plate Glass,* the Board's conclusion that future retirement benefits for current employees is a mandatory subject of bargaining is consistent with well-settled authority from this Court.

C. The NLRB's Use of the Waiver Analysis Is Not in Conflict With the Federal Courts.

Petitioner contends that the NLRB's use of a waiver analysis in determining if the employer was required to bargain with the Union is in conflict with the federal courts. Again, that position is underpinned by a mischaracterization of the case before the Board as involving current "retirees" rather than current "active employees" as well as a miscasting of the issues presented to the Board.

In order to demonstrate the fallacy in GPC's position, it is necessary to return the focus to the issue before the Board. The issue before the Board and the issue decided by the Board was whether retirement benefits for current, active employees were a mandatory subject of bargaining and, if so, whether the Union had waived its right to bargain over that subject. With regard to that issue, the Board first held that retirement benefits for current em-

ployees are a part of their wages which is a mandatory subject of bargaining. That holding was totally in accord with this Court's opinion in *Pittsburgh Plate Glass. See,* 404 U.S. at 159. With respect to the second sub-issue, the Board determined that a waiver of the statutory right to bargain could not occur unless such a waiver is "clear and unmistakable". Again, that holding was in complete accord with a prior decision of this Court. In the case of *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983) this Court held that

> We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the understanding is "explicitly stated." More, succinctly, the waiver must be "clear and unmistakable."

Id. at 460 U.S. 708.

Therefore, the use of a waiver analysis by the Board is entirely consistent with established law based upon decisions of this Court and accordingly is not in conflict with the Federal courts.

D. There Is No Conflict Between the Circuits and the NLRB as to the Legal Effect of Reservation of Rights Provisions in Retiree Welfare Benefit Plans.

The issue before the Board was whether an employer was required to bargain with its union over changes in welfare benefits that affect current, active employees. The issue was not whether any particular clause in a benefit plan was enforceable, nor was it whether a particular level of benefits must be maintained. The Board concluded that an employer must bargain over changes in benefits that affect current employees. That holding is supported by well-founded authority from this Court. *See, Pittsburgh Plate Glass,* at 404 U.S. 164. The Board's determination

is totally consistent with the meaning and effect of reservation of rights clauses in the context of the duty to bargain issue which was before the Board. Moreover, as we have shown, the Board's waiver analysis was in all respects in accord with authority from this Court. *See, Metropolitan Edison Co. v. NLRB* at 460 U.S. 708 (Waiver of an important statutory right under the National Labor Relations Act must be "clear and unmistakable"). That being the case, the Board's ruling does not place it in conflict with Circuit Courts of Appeals which have enforced reservation of rights provisions in the context of contract disputes.

E. Certiorari Is Not Justified Because of Concerns of Forum Shopping.

The threat of forum shopping which the Petitioner urges is a result of the Board's use of a waiver analysis is grossly overstated. Petitioner argued repeatedly in the lower court and in its petition for certiorari that a different result would have occurred had this case been brought in the District Court under Section 301 of the LMRA or under ERISA. While Petitioner is correct that a different result would have occurred had the Union attempted to bring its claim under Section 301 or ERISA, that difference does not raise concerns regarding forum shopping. In filing charges with the NLRB, the Union was seeking to require Petitioner to bargain over a change in wages in the form of future benefits for the employees represented by the Union; it was not seeking to enforce a labor contract or to enforce a provision in an ERISA—covered plan. Therefore, most assuredly had the Union brought its claim under either Section 301 or under Section 502 of ERISA (29 U.S.C. § 1132), it would have obtained a different result from that obtained from the Board; in either of those cases, its Complaint would have been dis-

missed because the National Labor Relations Board has primary jurisdiction to determine whether an employer has failed to bargain in good faith. (*See, Laborers Health and Welfare Fund for Northern Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 548-49 (1988) (No jurisdiction under ERISA to determine failure to bargain in good faith allegations); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) (Federal courts should defer issues regarding unfair labor practice determinations to NLRB). This difference in result is hardly one that encourages forum shopping.

Finally, we note that, even if GPC were correct that the Union had a choice of remedies, that is not a situation which is unique under our system of federal labor laws. For instance, even though the Board has exclusive jurisdiction to determine unfair labor practices with respect to secondary boycotts [NLRA, Section 8(b)(4), 29 U.S.C. § 158(b)(4)], an employer may still sue for damages arising from a secondary boycott under Section 303, of the Labor-Management Relations Act (29 U.S.C. § 187). Similarly, federal court jurisdiction exists for suits against a union for breach of its duty of fair representation [*Vaca v. Sipes*, 386 U.S. 171 (1967)] even though a breach of the duty is also an unfair labor practice within the jurisdiction of the Board. [*See, e.g., Red Ball Motor Freight*, 157 N.L.R.B. 1237 (1966), enforced *sub nom, Teamsters Local 586 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967)].

CONCLUSION

For the reasons set forth above, we urge that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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